01-784

No. 01-784

In The

Supreme Court of the United States

UNITED STATES OF AMERICA; UNITED STATES OF AMERICA, ex rel. ROBERT J. NORBECK,

Petitioner,

v.

BASIN ELECTRIC POWER COOPERATIVE,

Respondent.

Supreme Court, U.S.
FILED
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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

IRVIN B. NODLAND
IRVIN B. NODLAND, P.C.
P.O. Box 640
Bismarck, ND 58502-0640
701-222-3030
Attorney of Record
for Robert J. Norbeck

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the decision of the Eighth Circuit Court of Appeals conflicts with decisions of the Supreme Court and with prior decisions of the Eighth Circuit concerning application of the doctrine of "clear error".

(2) Whether the appeals court held plaintiff to a burden of proof higher than that required by the False Claims Act.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America, ex rel. Robert Norbeck, as relator under the False Claims Act.

Respondent is Basin Electric Power Cooperative of Bismarck, North Dakota.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review a decision of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The Eighth Circuit opinion dated April 30, 2001 (App. p. 1) is reported at 248 F.3d 781 (8th Cir. N.D.) (April 30, 2001, No. 99-3122, 99-3216, 99-3450); rehearing and rehearing en-banc denied August 21, 2001. (App. p. 103) The Memorandum and Order dated March 26, 1999 (App. p. 68) appears at 1999 WL 33283354 (D.N.D. March 26, 1999, No. A-1-95-003), and is not otherwise reported. The district court's amended Memorandum and Order is dated June 30, 1999, is not reported, and appears in (App. p. 96) Final Judgment on remand in conformance with the Eighth Circuit opinion was entered in the district court September 25, 2001. (App. p. 104)

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on April 30, 2001. Order denying timely petition for rehearing en banc was entered August 21, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

This case involves 31 U.S.C. § 3729(b) (False Claims Act) and Rule 52(a) Federal Rules of Civil Procedure.

In pertinent part, 31 U.S.C. § 3729(b) provides:

"(b) Knowing and knowingly defined. – For purposes of this section the terms 'knowing' and

'knowingly' mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required."

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." (App. p. 105)

STATEMENT OF THE CASE

The relator brought this action under the False Claims Act, 31 U.S.C. § 3729. *U.S. ex rel. Robert Norbeck v. Basin Electric Power Cooperative* was filed in the United States District Court for the District of North Dakota ("district court") January 8, 1995. The United States intervened on some issues and deferred to the relator to prosecute others. This petition requests review of one count successfully prosecuted in the trial court but reversed on appeal.

Defendant Basin Electric Power Cooperative, Bismarck, N.D. ("Basin", "Basin Electric") operates coal-fired electrical generating plants in an eight-state region of the Midwest. It has over 2,000,000 members. It markets its surplus power by private contracts. Some private contracts are with the federal government.

Basin contracted with the Western Area Power Administration ("WAPA"), an agency of the United States

Department of Energy. The WAPA/Basin 185MW contract ("contract") called for Basin to supply 185 Megawatts for 58 months. The contract called for more than $200 million to be paid to Basin. This one sale represented 41% of the surplus power generated by just one of Basin's multi-billion dollar power complexes.

The relator was Basin Electric's chief internal auditor and a member of senior management for 12 years. In January 1993, he placed Basin on notice of his intent to expose certain of Basin's business practices. Within days he was fired. In January 1995 he filed a False Claim Act ("FCA") complaint. This petition requests review of the appeal court's reversal of the district court's award of $35,938,955 in favor of the United States. The Eighth Circuit Court of Appeals ("Eighth Circuit", "appeals court") reversed the district court and ordered judgment in favor of Basin upon remand. A summary of the issue upon which the district court awarded $35,938,955 follows.

Basin agreed to charge WAPA for electrical power at "cost". "Costs" were to include 41 percent of Basin's interest and depreciation on the power plant from which the power would be supplied. Before the date when WAPA would first take power, Basin sold the plant and leased it back. This necessitated a restructuring of the contract. Basin would no longer own the plant and accordingly wouldn't be able to "pass through" costs of depreciation and interest to WAPA. The contract was modified by agreement so that Basin could substitute "lease costs" for the interest and depreciation it would have been passing through to WAPA had it continued to own the plant.

The overcharge claim arises because Basin did not apply a portion of the proceeds it received from sale of the plant so as to eliminate interest costs. Instead, these costs continued to be billed to WAPA for the life of the

Contract. The relator contended that failure of Basin to properly apply these sale proceeds so as to reduce debt resulted in an overcharge to WAPA. An expert witness supported this position. The district court agreed and found this action by Basin constituted a "reckless disregard for the truth". The Court found this resulted in an overcharge to WAPA of $13,051,233. This amount was trebled under the FCA. (The Court also assessed a $5,000 fine). Basin appealed and the appeals court reversed.

PROCEEDINGS BELOW

The matter was tried to the district court sitting without a jury in March 1999. The district court dismissed portions of the complaint and on the remainder found in favor of the United States. (App. p. 68) Basin petitioned for amendments to the initial judgment. Some of the requested amendments were allowed and the remainder denied. (App. p. 96) Basin appealed. The appeals court reversed the judgment of the district court holding that the district court had committed "clear error." (App. p. 1) Petition for Review *en banc* was denied. (App. p. 103)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE APPEALS COURT CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND WITH PRIOR DECISIONS OF THE EIGHTH CIRCUIT CONCERNING APPLICATION OF THE DOCTRINE OF "CLEAR ERROR".

Patrick A. Conmy, the presiding district court judge, is an experienced and able trial judge since 1986 (now senior status). Any fair reading of his decision will confirm he had intimate familiarity with the complex issues

involved in the case. The decision shows on its face that he fully understood the complexity of the issues and conduct of the parties. He gave careful consideration to the extensive evidence before him. He was in a unique position to evaluate the meanings that attached to the testimony. The litigation involved over 500 exhibits and nine days of testimony. The issues centered upon complex accounting and fraud issues, both subtle and overt. The trial court decision was well reasoned, was based on the merits, and had ample citations to the record showing a firm basis for the findings.

No obvious judicial bias appears on the face of the record. Plaintiff did not "win all". Examination of the claims will show that the trial court accepted some claims and rejected others. The trial judge dismissed major claims involving tens of millions of dollars. On the one claim presented, he made findings that Basin acted in "reckless disregard for the truth". The district court found Basin's conduct justified a finding of liability under the FCA.

A significant portion of the district court decision relied upon expert testimony. An expert's testimony gave strong support to the findings of the district court sitting as the trier of fact. The qualifications of the expert weren't challenged by Basin. No opposing expert was called to present a competing view of the evidence. The appeals court declared the district court findings "clearly erroneous". In doing so the appeals court ignored established precedent. The decision contravenes "clearly erroneous" standards established by the Rules, by the appeals court's own decisions, and by the United States Supreme Court. The appeals court adopted a different version of the evidence than the district court had found was proved by the witnesses and exhibits.

Precedent establishes that an appeals court show substantial deference to a district court when applying the "clearly erroneous standard" set out in Rule 52(a). The Eighth Circuit has said it will afford considerable deference to a district court's ability to assess credibility of witnesses. *United States v. Tucker*, 243 F.3d 499, 506 (8th Cir. 2001). In *Tucker, id.* at 506, the Eighth Circuit noted the "pole star" that mandates this compliance is the United States Supreme Court's decision in *Anderson v. City of Bessemer, North Carolina*, 470 U.S. 564, 105 S.Ct. 1504 (1985). In *Tucker*, the appeals court said:

> "Review for clear error 'requires not just deference to the fact finder's views, but a very specific level of deference'." *Tucker, supra*, at 506.

The *Tucker* court went on to say, "When findings are based on determinations regarding the credibility of witnesses, the level of deference is even higher than the standard already described." *Tucker, supra*, at 506. It is submitted that when the expert relied upon is unchallenged as to qualifications on the subject matter before the court and no competing expert is tendered to present an opposing view, the highest possible level of deference must be given to a decision of the district court that relied heavily upon that expert.

In *Anderson, supra*, the United States Supreme Court said:

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."

. . .

"In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*."

. . .

"Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from the facts."

. . .

"Documents or objective evidence may contradict the witness' story; or the story may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present the court of appeals may find clear error even in a finding purportedly based on a credibility determination (Cite omitted). But when a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and factually plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." (Cite omitted) *Anderson, supra.*

Factual determinations regarding conflicting expert testimony must also be reviewed under the "clearly erroneous standard". *Hoefelman v. Conservation Comm'n of Mo. Dept. of Conservation*, 718 F.2d 281 at 285 (8th Cir. 1983). When expert testimony presents "competing views of the evidence" and complex issues, the Eighth Circuit says it

will "not disturb the district court's decision to credit the reasonable testimony of one of the two competing experts." *Pioneer Hi-Bred Int'l v. Holden Found Seeds, Inc.*, 35 F.3d 1226, 1238 (8th Cir. 1994). This is the law when there are "competing views" of the evidence. But in this case there was not even a competing expert's view presented. Violation of accounting standards was a crucial part of plaintiff's case. No expert contravened the testimony of plaintiff's expert that Basin's financial accounting for its billings to WAPA was performed in violation of Generally Accepted Accounting Principles ("GAAP"). Neither did any expert present any competing view of how Basin's conduct related to the classic hallmarks of fraud and "reckless disregard for the truth".

Ms. Shawn Deisz ("Ms. Deisz"), an employee in Basin's accounting department, presented Basin's version of the facts. But she was not tendered as an expert to present a "competing" expert's view. The testimony of Dr. Lester Heitger, plaintiff's expert, covers 215 pages of the transcript. If the standards set out by the Eighth Circuit in *Pioneer Hi-Bred Int'l*, id, are followed there would have to be a finding that Dr. Heitger's testimony was implausible and unreasonable or not based upon facts in the record. Any fair reading of his testimony demonstrates this standard for rejection is simply not met.

Dr. Heitger gave explicit testimony concerning a number of generally accepted principles of accounting promulgated by the Financial Accounting Standards Board ("FASB") that were applicable to the case. He said Basin's accounting practices in calculating its billings violated various provisions of GAAP.

Like *Pioneer Hi-Bred Int'l*, id, this was a "complex case". But unlike *Pioneer Hi-Bred Int'l*, no "competing" expert view was presented. Here the district court did not

even have the burden of weighing competing expert views. On the accounting issues essential to a determination of this case, there was only one expert and that was plaintiff's expert, Dr. Heitger. The court received fact testimony from Basin's witness, Ms. Deisz, but she was not disclosed or tendered as an expert on the complex accounting issues necessary for a determination of the case. The trial judge had Ms. Deisz before him. He had the benefit of assessing her credibility and demeanor. He noted in his decision that she was "loyal" to Basin but he rejected her version of the facts. He was in a unique position to do so. Ms. Deisz was heavily involved in the very accounting practices that gave rise to the false claim allegations. Such a role should justify extra scrutiny by any trier of fact.

Where motive is an issue, the weight of the testimony of a competing fact witness on questions of fact is for the finder of fact to decide subject only to review under a "clearly erroneous standard". *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 675 (8th Cir. 1986). *No reason based on credibility is given in the appeals court decision as to why Deisz's competing view should be found more believable.* The district judge rejected her factual presentation and accepted the views of plaintiff's expert saying, "Professor Heitger's analysis is sound". (App. p. 87)

A reviewing court cannot reverse a district court's findings simply because it would have decided the case differently. *Hunt v. Cromartie*, 121 S.Ct. 1452, 532 U.S. 234, 149 L.Ed.2d 430 (2001). Plaintiff's expert had high qualifications to testify on the issues to which he testified. He was not challenged on his qualifications. He conducted a thorough investigation of the evidence. He expended in excess of 500 hours gathering, analyzing, and reporting his findings. He sat through most of the nine days of trial.

He heard the testimony of the witnesses. He gave clear and unequivocal testimony of numerous violations of GAAP Basin had committed and advised the district court concerning conduct of Basin that fit the classical hallmarks of business fraud.

The role of the expert at trial has undergone major change in the past 10 years. See, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Eighth Circuit decisions have contributed heavily to the change. In *Weisgram v. Marley Co.*, 169 F.3d 514 (8th Cir. 1999), the Eighth Circuit re-defined the rules of admissibility of expert testimony. (Affirmed 528 U.S. 440). In *Weisgram*, on appeal, the court assumed the function of "gatekeeper" and determined that a witness accepted as an expert by the trial court didn't have the required expertise. In this case, however, the Eighth Circuit takes a significant step beyond *Weisgram* in diminishing the role of the expert. The appeals court makes no accusation here that the district court failed in its "gatekeeper" function. The appeals court completely disregarded the testimony of the only expert to testify even though he had superior qualifications and experience, was not challenged as to his expertise, and was not subjected to criticism in the form of contrary expert view.

We can find no case where an appeals court has substituted its own competing view of the evidence for that of the prevailing party where the district court decision relied upon the testimony of an expert who was unchallenged as to qualifications and whose views were not contravened by the competing view of an opposing expert.

It would be an abuse of discretion and perversion of the historic division of responsibility between trial and appellate courts for this decision to stand. The scope of expert testimony and of experts' qualifications to testify

on specific subject matter may well need periodic redefinition to meet the needs of changing times. But the conclusions of an expert whose expertise has gone unchallenged and against whom no competing expert view was presented, when added to the observations and expertise of a seasoned and experienced trial judge, should not be subject to a label of "clear error". If such a decision can be declared "infected" with "clear error", as it was in this case, the concept of "great deference for the findings of the trial judge" is an empty mantra, available whenever a reviewing court would like for the case to be decided differently.

The appeals court dismisses the testimony of plaintiff's expert entirely, saying it does not withstand "scrutiny". For the past 28 years, Dr. Heitger has been a professor on the faculty of the prestigious Kelly School of Business at Indiana University. He is a nationally recognized authority/expert on cost and other accounting issues involved in this case. He teaches forensic accounting with national recognition, management accounting, cost accounting, financial accounting, and auditing. These were the very subject matters involved in the FCA allegations against Basin. Dr. Heitger teaches these courses at the undergraduate, MBA, and Ph.D. levels. He is the author of widely adopted textbooks that deal with the concepts of cost, managerial, and financial accounting. He has written an MBA-level handbook on accounting and finance along with dozens of supplementary textbooks. He wasn't an expert of marginal expertise. He is widely recognized as an authority in the United States on the subject matters about which he testified.

It was crucial that experts testify on the accounting issues involved here. The parties in this lawsuit agreed the contract in issue was governed by GAAP.

The subject matter of Dr. Heitger's testimony involved complex issues of GAAP accounting and involved identifying the hallmarks of business fraud found present in Basin's conduct. The district court accepted Dr. Heitger's expert testimony on these issues as "sound". The appeals court accepted a competing view presented by a fact witness from Basin's accounting department. From her testimony the appeals court fashioned its own "competing view" of the evidence without any reference to required accounting standards. Only one reference is made by the appeals court to any specific evidence in the record for a "competing view" of the facts. It said:

> "Finally, although Norbeck has the burden of proof on his contract claims, Basin points out that it did introduce evidence, through the testimony of Ms. Shawn Deisz, an executive in Basin's accounting department, that supports Basin's description of how the overcharge took place."

The fraud alleged in relator's complaint involved accounting practices of the very department in which Basin's testifying employee worked. The appeals court adopted this employee's version of the facts as a "description of how the overcharge took place". It was not a "competing view" of the accounting issues. It was a competing factual version of "how the overcharge took place". There is no reference to the legality or compliance with GAAP of this version. Yet this version became the basis upon which the appeals court reversed a $35,938,955 fraud judgment that had been entered by the district court.

Clearly the appeals court substituted its own claim of expertise on the complex accounting principles for those of plaintiff's expert. In doing so the appeals court didn't follow the standard of review it has developed in its own

cases. The appeals court's rejection of plaintiff's expert was based upon its own "scrutiny" of the evidence. It said:

> "Although the district court relied upon Heitger's expert testimony, which Norbeck contends should be sufficient to support the judgment, a close examination of Heitger's testimony reveals that neither of his arguments withstand scrutiny."

In the "close examination" that follows, the appeals court accepts the version of Ms. Deisz and from it fashioned its own "competing view" of the evidence. Credibility and demeanor of the witnesses, both Dr. Heitger and Ms. Deisz, are ignored. Unchallenged expertise on the complex accounting issues is disregarded. The appeals court doesn't pay deference to its own admonition given in *Tucker*, 243 F.3d at 506, where it said that an even higher deference must be paid to the opinion of the district court where the credibility and demeanor of the competing witnesses are an issue.

The district court's decision expressly acknowledges the contribution made by Dr. Heitger. From him and other voluminous evidence presented, the district court gained essential insights into the accounting and fraud issues presented. We will detail a few of the more specific insights here.

The contract called for WAPA to be billed at the "lowest reasonable cost". Various GAAP concepts were essential to calculating WAPA billings under the contract. One key GAAP concept presented to the district court by Dr. Heitger is the "entity" concept. No one presented an opposing expert view. Dr. Heitger's advice played an essential role in the formulation of the district court's decision. Dr. Heitger testified the "entity" concept in accounting was violated by the way Basin did its "cost" accounting.

In its simplest terms, the "entity" concept requires that financial transactions for essentially separate entities be recorded sufficiently separate so that the financial impacts of the transactions affecting the separate entities can be sorted, identified, and fairly allocated. The accounting must be done in such a way that it's possible to "reconstruct" the transactions to determine how each of the separate entities has been financially impacted. Basin claimed it "pooled" costs for several of its entities. That position became its principal defense. While Basin asserted that this is what it did, no expert accounting support was presented to establish that the manner in which Basin recorded and billed these "pooled" expenses was an acceptable method of accounting where the methodology impacts "cost" contracts requiring GAAP accounting.

Plaintiff's expert testified that Basin's accounting for WAPA billings violated various GAAP concepts. The appeals court accepted Basin's explanation of how it was done without concern for whether such methodology violated GAAP concepts. Nowhere is the appeals court's error made clearer than in its misunderstanding of the facts and its misapplication of the law as related to this "pooling" of costs issue. The appeals court states:

> "Once the KPMG audit was complete, Basin challenged KPMG's assumption that it maintained separate pools of debt for the AVS facility. KPMG investigated whether its assumption was correct, and the guarantor's of Basin debt confirmed to KPMG that Basin kept all AVS debt in a single pool. Once KPMG learned this, it withdrew its conclusion that Basin owed WAPA in excess of $15 million." (App. p. 10)

There are two important points to be made: (1) the quote represents a significant departure from the facts;

and (2) even if true, the fact of "pooling" costs, in a cost contract, without ability or willingness to reconstruct and allocate for billing purposes, represented a violation of GAAP cost concepts.

The appeals court's representation of the facts involving "pooling" is erroneous. What the appeals court describes didn't happen. The KPMG Peat Marwick ("KPMG") auditors who conducted an on-site audit for the Office of Inspector General ("OIG"), Department of Energy, wrote their audit was "impaired" because of the limitations Basin placed on their auditors' access to information. These auditors were not satisfied they had been given full access to all of the documents needed to resolve the issues raised by the relator. They were unable to reconstruct transactions related to the "pooling" claim from the documents Basin made available to them.

Consequently, after completing their work at Basin's headquarters they went to Washington to visit with the Rural Utility Services ("RUS"), an agency of the United States Department of Agriculture. The RUS was one of Basin's lenders. KPMG hoped RUS might have the documents it felt were needed to fully understand how Basin allocated costs. But they were unable to get the necessary documents from RUS either. The KPMG auditors then gave up pursuit of this issue. The pursuit was abandoned, not in satisfaction, but in frustration. At trial the KPMG auditor testified:

> "Their records [RUS] were not entirely available and inconclusive in many respects, but it appeared, as I recall – again, you'll have to ask Christiansen – he was the one there – but its my understanding that the records were not all retrievable because of the age, and that probably there was no separate accounting between AVS I and AVS II: that it was all just one lump sum."

The appeals court asserts KPMG "withdrew its conclusion that Basin owed WAPA in excess of $15 million". KPMG never reported that it was withdrawing such a conclusion. The government simply deferred pursuit of that matter to the relator. The government continued to actively assist relator in prosecution of the claim, however. At trial the government lawyers examined and cross-examined witnesses on the issues.

But aside from the misunderstanding of the facts, the appeals court failed to recognize that even if RUS confirmed Basin's claim that it had "pooled" these costs, that confirmation, if true, would itself be a violation of certain GAAP concepts in measuring billable costs under the contract. The appeals court's faulting of plaintiff's expert appears to be based upon a misunderstanding of the role played by KPMG auditors and Dr. Heitger's use of the KPMG audit. The appeals court says that this expert's view " . . . overlooks, however, the fact that the KPMG audit was based upon the faulty assumption that Basin separated each of the accounts."

The analysis presented by Dr. Heitger at trial had absolutely nothing to do with *any* assumptions made by KPMG in its audit. Dr. Heitger relied only on the financial data, the numbers retrieved by KPMG from Basin's books when it conducted a three-month on-site audit. He placed no reliance whatsoever upon any assumptions KPMG auditors may have made, be they faulty or accurate. He made his own analysis. The KPMG audit report went into evidence without objection and the factual content of the financial data gathered by KPMG in the audit was never challenged at trial.

But the extreme irony is that the violation of accounting standards became greater, not less, if the initial KPMG assumption proved to be in error. The accounting

truth, as Dr. Heitger testified, was that the pooling methodology of costs used by Basin was itself a violation of essential concepts of GAAP. No accounting expert testified to the contrary. None would. It was Basin's obligation to maintain financial information that would accurately reflect historical costs as defined by GAAP and fairly allocate "costs" among its separate entities. It was Basin's responsibility to keep its books so "cost" allocations could be re-constructed from the "pool". Basin didn't do so in any manner that would allow WAPA to be billed accurately at the "lowest reasonable cost". Basin simply asserted, "This was how we did it." RUS confirmed, "That appears to be how it was done." KPMG accepted the RUS representation and gave up any further investigation because of lack of documentation. The government deferred prosecution of the false claim issue to the relator as it is legally entitled to do under the FCA.

The district court characterized Basin's pooling methodology "a glob". Plaintiff's expert testified this glob method was not an acceptable method of accounting. No "competing expert view" was presented and none could have been. No credible accounting expert would ever support use of a multi-entity "glob" to define billable "costs" under a "cost" contract.

In another essential insight, Dr. Heitger provided the district court with a "parallel construct". The district court found this technique helpful in testing the accuracy of plaintiff's premise and calculations. The appeals court dismissed use of this device, *ad hominem*, stating the construct "failed" because it assumed the truthfulness of the premise being tested.

"Parallel constructs" never assume the truthfulness of the premise they are testing. They exist to confirm or disprove the validity of a tentative conclusion. Dr.

Heitger had arrived at a tentative conclusion. The purpose of the parallel construct was to test the validity of that conclusion in order to achieve a higher comfort level with its accuracy. When Dr. Heitger performed the parallel construct, the result reached concerning the amount of overcharge was identical almost to the dollar as he had found when he had done a conventional initial analysis.

In rejecting Dr. Heitger's analysis as confirmed by his parallel construct, the appeals court says it doesn't matter in any event because plaintiff couldn't show that the misapplication of "costs" had any negative impact on the billings made to the government. As footnoted support for this proposition, the appeals court quotes a question put to Dr. Heitger by the trial judge and his answer in response. Resorting to this one response, taken out of context of 215 pages of his testimony, seriously distorts the position taken by this expert. In the context of the record as a whole it is not possible to fairly suggest that this expert believed Basin's misapplication of costs had no adverse effect upon WAPA billings. He testified expressly that they did. His testimony was absolutely clear on the point. It was not right for the appeals court to attempt to lend support to its "competing view" by lifting out of context one response made in answer to a question from the court. A re-reading of his testimony as a whole will demonstrate that what the expert said in this one excerpt is, "If everything had been done correctly everything would have been done correctly."

A similar taking out of context appears in footnote 8 of the decision. The court says, "We note that Norbeck admitted at oral argument that an examination of Basin's bills to WAPA would not reveal an overcharge." (App. p. 11)

The billings were reviewed by KPMG as confirmed in their audit report. The voluminous billings were also

provided to Dr. Heitger for his analysis and review. But, of course, an examination of only the bills would not reveal an overcharge. To find the overcharge one had to do the analysis Dr. Heitger did. One had to examine the mass of additional information necessary to understand how the bills were constructed. First, it was absolutely essential that one read and understands the "cost" contract upon which the bills were based. The bills themselves don't even recite the fact that this was a "cost" contract. Secondly, the bills don't recite the origin of the costs, the expenses pooled in violation of accounting principles, the misallocation of sales proceeds, the conscious decision to accelerate amortization for the life of the contract only, the documented decision to charge what Basin itself characterized in memorandums as "dummy" interest on its own internal funds. The bills don't recite a host of other large and "smaller edges" taken as mentioned by the district court in its decision.

There were additional important insights presented by Dr. Heitger. He – and only he – presented the principles of accounting applicable to this case. He explained how GAAP involving "consistency", "historical costs", and "uniformity" impacted his conclusions there had been a $15 million overcharge to the federal government. In its simplest terms he testified that these concepts dictated that consistent and uniform accounting principles be applied to all of the business entities operated by Basin. He gave specific illustrations of how defendant violated these important accounting requirements. These violations became the basis of his conclusions and materially impacted the district court's decision. In fact, the district court makes an express finding in its opinion: "I find the requirement of consistency and uniformity to be controlling." (App. p. 79)

The district court found Basin guilty of various contract violations, and on some awarded substantial damages ($8,032,031 in one instance), lesser amounts in another. On one issue the court found a "reckless disregard for the truth". The court elaborated at some length on the reason for the finding. The judge found expressly that Basin's accounting department "knew" that interest on a remaining debt that should have been paid off with sales proceeds continued to be billed to WAPA. (App. p. 92) He found the evidence showed Basin made a deliberate decision to retire debt not associated with the plant it had just sold rather than retire plant debt it would bill to WAPA during the 58 months of the contract. (App. p. 92) He found that after the whistleblower's letter placed Basin on notice, Basin's accounting team *deliberately* selected an assumption that the $99.5 million payment [sales proceeds] did not have to be applied to debt for which WAPA would continue to be billed. (App. p. 92)

The trial judge found that when he linked these findings to a "myriad of small edges" taken by Basin in the various areas of cost computations, the composite was sufficient to satisfy the "reckless disregard for the truth" requirements of the FCA. As to the other violations alleged, he concluded there had been only breaches of contract or he concluded they had not been proved.

The trial judge was entitled to take the composite of Basin's conduct into account in arriving at his conclusion that Basin had violated the FCA. There were many other examples of conduct consistent with "reckless disregard for the truth". Some are alluded to in the court's decision. For example, only after the whistle had been blown and Basin had been confronted with public exposure did Basin acknowledge there had been an overcharge. Only

then did it contact WAPA to promise there would be a refund. But it was the manner in which Basin calculated the overcharge once it had been exposed that raised additional questions from which the trial judge was entitled to conclude there had been a "reckless disregard for the truth".

Basin made a $2.4 million refund to the government for overcharges it admitted once it had been threatened with exposure. But in doing its refund calculations Basin committed egregious violation of the FCA. It calculated an amount of restitution that was false. Dr. Heitger explained in detail how this had been done and testified the refund should have been $15 million.

This litigation has gone on for years. It produced voluminous records, audits, depositions, exhibits, and affidavits. The trial lasted nine days. Dr. Heitger spent in excess of 500 hours reviewing accounting documents and analyzing their impact. He personally examined 500 or more exhibits offered at trial. He read the voluminous depositions. He reviewed voluminous financial data pertinent to this lawsuit that had been compiled by KPMG in an extensive on-site audit. The KPMG audit went into evidence at trial without objection. The audit consisted of huge numbers of documents containing virtually all of the financial data needed by Dr. Heitger to do his analysis. No factual data contained in the audit was challenged by Basin. From his investigation and based upon his knowledge, training, and experience, Dr. Heitger testified Basin had violated its contractual obligation to provide power at the "lowest reasonable cost". He testified Basin had violated GAAP concepts in performing its billing function, Basin had fraudulently or in "reckless disregard for the truth" misallocated proceeds of a leveraged lease, had imputed and overcharged interest,

and Basin had arbitrarily and temporarily accelerated the period of amortization on its power plant so that it could increase the amount of its cost billings to the government.

Basin was obligated under the contract to provide electrical power to WAPA at the "lowest reasonable cost". Basin sold the power plant that was to provide power to WAPA and leased it back. At that point a contract modification provided for "lease costs" to be substituted for what was to have been interest and depreciation on the plant. Basin didn't apply all of the proceeds it received from sale of the plant to reduce debt upon which interest was being charged to WAPA. The district court found expressly that "Cost under the contract require[d] the application of the $99.5 million to the credit of the asset sold to generate it and to the computation of further interest cost charges made to WAPA in addition to the lease payment "costs." (App. p. 87)

Dr. Heitger testified Basin's treatment of these transactions represented a deviation from GAAP. The deviation involving the misapplication of sale proceeds alone resulted in an overcharge to WAPA in excess of $15 million.[1]

Dr. Heitger brought objectivity, specialized knowledge, experience, and training to the issues. The appeals court misunderstood the nature, scope, and extent of his involvement. It suggests his work was limited to a review of the audit performed by KPMG. (App. pp. 10-11) This is not at all an accurate characterization of the 500 or more

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[1] The court awarded only $13 some million because it gave credit to Basin for a $2.4 million refund it made after the whistle had been blown.

hours of labor Dr. Heitger expended investigating and analyzing this case.[2]

The fact Dr. Heitger didn't personally conduct a second audit should be of no significance at all. There was no reason for him to conduct a new and separate audit to obtain financial data, the accuracy of which was never challenged. It would have been foolhardy for plaintiffs to spend another $300,000 to duplicate the work KPMG had performed for the OIG of the Department of Energy. It is doubtful, in any event, Basin would ever have agreed to a "second" audit for the same material in the same lawsuit.

It was error, even if it disagreed with the result, for the appeals court to reject the testimony of this unchallenged, highly qualified, highly-informed expert in favor of the court's own "competing view" derived from a version of the facts presented by one of Basin's own self interested, non-expert accounting employee. An appeals court should not assume the role of trier of fact. It is not in a better position than the trial judge to assess truthfulness of witnesses. The appeals court doesn't have more expertise in "truth finding" from cold transcripts than a trial judge listening and observing those witnesses. Also, the appeals court is not any more qualified than an expert witness to arrive at accurate conclusions from the complex accounting issues than was the finder of fact.

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[2] There are other significant misunderstandings of the facts that would appear to have impacted the appeals court decision. On page 7, for example, the court says: "Several years after the $2.4 million refund, Norbeck was fired and proceeded with this False Claims Act complaint." The record is clear Norbeck blew the whistle in January 1993 and within three weeks thereafter was fired. Within a few days thereafter Basin contacted WAPA and acknowledged the overcharge. Two years later, in November 1994 or January 1995, Basin made a $2.4 million refund. In January 1995, Norbeck began this lawsuit.

In *Anderson v. City of Bessemer, North Carolina, supra,* the court said:

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be the 'main event' . . . rather than a 'tryout on the road'." *Anderson v. City of Bessemer, North Carolina,* 470 U.S. 564, 574-575 (1985), 105 S.Ct. 1504.

II. THE APPEALS COURT HELD PLAINTIFF TO A BURDEN OF PROOF HIGHER THAN THAT REQUIRED BY THE FALSE CLAIMS ACT.

The False Claims Act, 31 U.S.C 3729(b), states that a person acts "knowingly" if he:

(1) has actual knowledge of the information;
(2) acts in deliberate ignorance of the truth or falsity of the information; or
(3) acts in reckless disregard of the truth or falsity of the information,

and no specific intent to defraud is required.

In *United States of America v. George O. Krizek, M.D., et al.*, 111 F.3d 934, 324 U.S.App.D.C. 175 (1997), the court

held that the "reckless disregard" standard of the FCA is properly equated with "gross negligence".

The Eighth Circuit's precedent establishes that even "extreme carelessness" may amount to "knowing" conduct under the FCA. *United States v. Cooperative Grain & Supply Co.*, 746 F.2d 60 (8th Cir. 1973).

In this case the Eighth Circuit required a higher standard of proof than the law requires. In the decision it said the "correct question" to be asked is whether Basin knew it was overcharging, not whether it did in fact overcharge. The burden of proof recited is indeed a permissible standard ("actual knowledge") but not the only one. The appeals court stated:

> "It appears that the district court's analysis is infected with the same error as Norbeck's argument: that Basin's decision to use $99 million of AVS II proceeds on non-AVS debt was somehow inappropriate. The correct question is whether Basin knew it was overcharging WAPA, not whether Basin knew it was paying off non-AVS debt. The district court did not point to any evidence of this."

This statement is an incorrect statement both as to the law (False Claim Act, 31 U.S.C. § 3729) and as to the facts of the case. The district court did in fact point to numerous items of evidence that it considered in arriving at its conclusion that Basin had acted in "reckless disregard for the truth". "Actual knowledge" is one of the ways liability can be proved but two lower standards of proof are also sufficient ("deliberate ignorance" and "reckless disregard of the truth"). In this case the trial judge expressly found that Basin acted in "reckless disregard for the truth". By requiring that plaintiff prove "Basin knew it was overcharging", the appeals court committed reversible error.

The quotation above also indicates the appeals court was unwilling to allow the trial judge to be the assessor of both the direct and the subtle facts present in the case. There was more than ample evidence of Basin's "reckless disregard for the truth" in this record. Some were overt, some subtle. Just a few illustrations are as follows:

1. Basin's confession of overcharge to WAPA was disingenuous. When threatened with exposure by the whistleblower, Basin fired him and then contacted WAPA. It represented that Basin's own staff had come upon the error during a routine audit. The truth was that its reconstruction of the record was a result of a letter threatening exposure received from the whistleblower.
2. At the same time as it advised WAPA it had been overcharged, Basin promised it would hire an independent auditor to verify the correct amount of overcharge. It never did this. The auditing firm retained merely checked Basin's calculations and issued a disclaimer stating that the procedures it followed didn't constitute an audit in accordance with Generally Accepted Accounting Standards. For that reason the auditors said they would not express an opinion on any of the elements contained in the report.
3. Prior to the government's intervention into the lawsuit the defendant attempted, in writing, to mislead the Justice Department into believing there had been an independent audit that had verified the correctness of the overcharge. It continued similar representation to the district court thereafter, stating that the amount of the refund had been verified by an independent audit. This was never true.
4. The district court was also entitled to take into consideration the fact that when the OIG audited Basin's records, Basin interfered with the normal auditing process to a point where the audit report

notes that the audit was impaired. The report says: "Consequently because of this scope impairment, we did not have assurance that we were provided all information and documents pertinent to the audit issues."

5. The district court was also entitled to consider that prior to the commencement of the accounting practices complained of by the relator, Basin made deliberate accounting decisions that resulted in an overcharge to the government. In a staff memorandum (trial exhibit 324) dated September 27, 1985 (this was three months prior to commencement of the overcharging), Basin staff openly discussed among themselves the impact its intended application of the sales proceeds would have upon long-term contracts like the one with WAPA that was about to become operative. The staff discussed the fact that Basin was going to pay off high-interest notes that were unrelated to the plant they were selling and for which lease payments to WAPA were to be substituted. In an incriminating admission the staff stated that Basin's "cost reporting" of the sale leaseback transaction may cause problems because its long-term contracts "have historically been based on REA and Basin Electric Cost reporting." This evidence of deliberate decision making that resulted in the very transaction that gave rise to the $2.4 million refund Basin eventually admitted is expressly referred to in the district court decision. (App. p. 92)

6. The district court was entitled to consider the "whistleblowing" letter the relator wrote to Basin giving notice that he was about to expose seven business practices of Basin. Upon receipt of the letter, the actions of Basin's Chief Executive Officer indicated he knew where his company was vulnerable. He ignored six of the seven items

raised and went immediately to his staff as to the seventh. That item was the issue of how Basin had accounted for the WAPA contract. The review that followed resulted in Basin's call to WAPA advising there had been an overcharge. Two years later Basin made a $2.4 million refund. The WAPA employees who received the refund never questioned its accuracy. As the district court found, they merely accepted the calculations of their friends at Basin. But as the plaintiff's expert testified and the district court found, the refund should have been $15 million.

CONCLUSION

An appeals court is not permitted to substitute its own view of the evidence for that of the district court unless there is in fact "clear error". *Anderson, supra,* 573-574. Here there was no "clear error" There was only the adoption of a competing view of the evidence. The view adopted by the trial judge relied heavily upon the investigation, findings, and conclusions of an expert. The appeals court rejected the testimony of that expert simply declaring that his analysis did not bear scrutiny. There was no basis for attacking the qualifications, competence, or depth of investigation by the expert or the analysis of the seasoned and experienced trial judge.

The appeals court declared the district court's view of the evidence to be "clearly erroneous". It then substituted its own view, ignoring the complex accounting principles and business fraud issues that had been considered by the trial judge. On the issue before the court on this petition, the appeals court based its reversal of the district court upon the testimony of one self-interested, non-expert employee of the defendant itself. She was an

employee who had been heavily involved herself in the billing overcharges that had implicated the FCA.

The appeals court decision frustrates the Congressional intent of the False Claims Act. It violates Rule 52(b), Federal Rules of Civil Procedure, case law, and a sacred principle of American jurisprudence that says great weight must be given to a district court's findings of fact. *Anderson, supra.* Here no weight was given to the district court's view of the facts. In addition, no consideration is given to how the facts, even those adopted in the appeals court's view of the evidence, were impacted by the relevant accounting and fraud principles involved in the case.

The role of "weighing evidence" is one assigned to our district courts. The trial should be the "main event", not a stop on the road to one. It would be an abuse of discretion and a distortion of the historic relationship of trial and appeals courts to allow the appeals court here to reject the view of the evidence adopted by an experienced trial judge, especially when he relied heavily upon the testimony of a highly qualified expert whose expertise was unchallenged. Even if the appeals court disagreed with the trial court's view of the evidence, it should not be allowed to substitute its own view based upon competing factual testimony of a non-expert, interested employee as that testimony is reported in the cold transcript. In this case, saying there was clear error does not make it so. Saying there was no support in the record for the district court decision does not make it so. The decision of the district court should be reinstated.

In applying its view of the evidence, the appeals court also demanded the highest standard of proof that is "actual knowledge". But "actual knowledge" is not required under the FCA. The appeals court said the issue was whether Basin "knew" it was overcharging – not

whether it did. The FCA does not require actual knowledge of the fraud. The district court decided this case correctly basing its findings upon a different standard as is permitted by the FCA. The district court found that Basin acted in "reckless disregard for the truth".

Respectfully submitted,

IRVIN B. NODLAND
IRVIN B. NODLAND, P.C.
Attorney for Robert J. Norbeck
P. O. Box 640
Bismarck, ND 58502-0640
701-222-3030

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United States Court of Appeals
For The Eighth Circuit

No. 99-3122

United States of America;
United States of America,
ex rel Robert J. Norbeck,

Plaintiffs-Appellees,

v.

Basin Electric Power Cooperative,

Defendant-Appellant.

Appeals from the United States District Court for the District of North Dakota.

(Corrected May 15, 2001)

No. 99-3216

United States of America,

Plaintiff,

United States of America,
ex rel Robert J. Norbeck,

Plaintiff-Appellant,

v.

Basin Electric Power Cooperative,

Defendant-Appellant.

NO. 99-3450

United States of America,
Plaintiff-Appellant,

United States of America,
ex rel Robert J. Norbeck

Plaintiff,

v.

Basin Electric Power
Cooperative,

Defendant-Apepllant.

Submitted: October 18, 2000

Filed: April 30, 2001

Before WOLLMAN, Chief Judge, LAY and BEAM, Circuit Judges.

LAY, Circuit Judge.

PART I. INTRODUCTION

Basin Electric Power Cooperative ("Basin"), located in North Dakota, was organized to build power plants and provide power for its members. In the late 1970s and early 1980s, Basin constructed the Antelope Valley Station ("AVS facility") in North Dakota, which is the subject of

this litigation. The AVS facility includes three separate parts: two power stations ("AVS I" and "AVS II"), and a set of common facilities designed to provide service to both AVS I and AVS II.

This litigation stems from a contract (the "Basin-WAPA contract") between Basin and Western Area Power Administration ("WAPA")[1]. During the course of building the AVS facility, Basin realized that the AVS facility would generate more power than its members demanded, so Basin needed to sell this excess power to keep the price of power from the AVS facility at a reasonable rate. At the same time, WAPA needed extra power to meet the demands of its customers. In 1982, WAPA contracted to buy 185 mega-watts ("MW") of the 450 MW capacity of AVS II. When the parties executed the contract, they could not accurately predict the price of power for the life of the contract. Accordingly, they agreed that WAPA's price would be based on the cost of power production. The contract provided that WAPA would pay 185/450th, or forty-one percent, of the cost of producing power at AVS II.

The methodology Basin used for determining the cost of AVS II power was set out in Exhibit A of the contract. Exhibit A listed a series of fixed and variable or energy related costs associated with producing power at the AVS facility, such as interest on debt, operation costs, steam

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[1] WAPA is a unit of the Department of Energy, which generates and distributes power to regional or local distribution utilities.

expenses, and maintenance costs. The Rural Utilities Service ("RUS") promulgated the Rural Utilities Service System of Accounts ("RUS System") upon which these cost categories were based.[2] The RUS System incorporates Generally Accepted Accounting Principles ("GAAP"), a series of general principles followed by accountants. Included in GAAP are the Financial Accounting Standards ("FAS") published by the Financial Accounting Standards Board ("FASB").

However, before WAPA began purchasing power from AVS II, Basin sold AVS II to a consortium of corporate investors for a total of $622,875,000, and leased it back, paying a monthly lease cost instead of interest cost on AVS II debt. Consequently, the Basin-WAPA contract was modified to reflect that WAPA's cost of power would include a pro rata share of lease costs, rather than interest costs, for AVS II.

The contract was executed in 1982 and ran from 1985 to 1990 without any apparent problems. In 1992, Robert Norbeck ("Norbeck"), who worked as Basin's chief auditor during the Basin-WAPA contract, faced the prospect of losing his job. He sent a "whistle blower" letter to Basin's management, threatening to reveal several of Basin's allegedly fraudulent transactions unless he kept

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[2] The Basin-WAPA contract actually lists "REA Accounts." The REA, or Rural Electrification Administration, was the predecessor to RUS. RUS, and the REA before it, acted as the guarantor of Basin's debt, and oversaw many aspects of Basin's administration. We will refer to both these entities as the "RUS."

his job. Undeterred by the letter, Basin fired Norbeck,[3] who responded by bringing a *qui tam* action under the False Claims Act.[4] *See* 31 U.S.C. §§ 3729-3733. The Government eventually intervened, although it pursued only contract claims, as opposed to claims under the False Claims Act, against Basin. Norbeck, as the Relator, then pursued the false claims abandoned by the Government.

Broadly stated, the parties bring four issues on appeal. First, Basin appeals the district court's finding that Basin violated the False Claims Act with regard to the manner in which it accounted and billed for the sale/leaseback of AVS II. Second, Basin appeals the district court's finding that Basin breached the Basin-WAPA contract by choosing a ten-year amortization period for the common facilities. Next, on cross-appeal, Norbeck claims the district court erred when it found that Basin did not breach the Basin-WAPA contract by including post-construction imputed interest as a cost of power charged to WAPA. Finally, the Government cross-appeals the district court's finding that Basin's calculation and billing for coal costs did not constitute a breach of contract. We discuss these issues seriatim.

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[3] Norbeck's discharge from Basin was the subject of a separate discrimination suit in which a jury awarded no damages to Norbeck. Norbeck appealed his case to this court, where the jury verdict was affirmed. *See Norbeck v. Basin Elec. Power Coop.*, 215 F.3d 848 (8th Cir. 2000).

[4] The False Claims Act allows an individual (the Relator) to bring a *qui tam* claim – a claim "in the name of the Government." 31 U.S.C. § 3730(b)(1). A Relator who brings a false claim that is ultimately successful can recover a percentage of the damages awarded. *See id.* at § 3730(c)(1)-(2).

PART II. OVERCHARGE OF $15.5 MILLION VS. $2.4 MILLION

A. Background

Initially, Basin challenges the district court's finding that Basin overcharged WAPA due to Basin's sale and leaseback of AVS II. Although Basin admits some overcharge occurred and returned approximately $2.4 million to WAPA before trial, the district court found that the total amount of Basin's overcharge was approximately $15.5 million. In accord with this decision, the district court awarded WAPA slightly over $13 million ($15.5 million minus $2.4 million) in contract damages. The district court further found that Basin submitted these overcharges to WAPA in violation of the False Claims Act and multiplied the contract damages as provided for in the Act for a total judgment of $35.95 million. On appeal, Basin asks that we reverse the district court's award, arguing that Norbeck[5] introduced no evidence to support the district court's judgment. We agree, and we reverse the district court's award of $13 million in contract damages, as well as the award of multiplied damages under the False Claims Act.

Like most large power facilities, the AVS facility was financed on debt. Under the original Basin-WAPA contract, WAPA's costs included a share of interest payments on AVS II. WAPA's costs also included a share of the interest from the common facilities. Since only a portion of the common facilities served AVS II, only a portion of

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[5] The Government has not pursued this claim.

common facilities' interest was allocated to AVS II, and only a pro rata share of that was passed on to WAPA.

After the formation of the original Basin-WAPA contract, Basin's new general manager discovered that it was in serious financial straits. To raise money to pay off debt, Basin sold AVS II to an outside group of investors and then leased it back, retaining full control over the operations of AVS II, but now paying a monthly lease. Since the original agreement made WAPA responsible for a share of AVS II interest, and the sale/leaseback of AVS II eliminated AVS II debt, Basin and WAPA altered their original agreement. Under the new agreement, WAPA became responsible for a share of AVS II lease payments in lieu of AVS II interest payments. The common facilities were not a part of the sale/leaseback of AVS II, so this amendment to the Basin-WAPA contract did not affect WAPA's responsibility for its share of common facilities' interest.

Basin, however, did not apply all of the money it received from the sale of AVS II to AVS project debt. Approximately $99.5 million went to pay off higher interest debt from other projects. WAPA's agreement to pay a share of AVS II lease costs as a substitute for AVS II interest costs meant that WAPA should not have been responsible for any interest from the unretired $99.5 million. Both parties agree that WAPA was charged for some of the interest from the $99.5 million. They disagree, however, on the amount of the overcharge.

To understand Basin's explanation for the overcharge on interest from the $99.5 million in unretired debt, a brief examination of Basin's accounting procedures is necessary. Basin did not keep separate pools of debt for

each of the AVS facilities. Instead, all AVS debt was kept in a single pool. Since the cost of power from AVS I and AVS II included interest on debt from the facility providing the power, as well as a portion of the interest from the common facilities, Basin needed to allocate the interest from this pooled debt to each of the AVS facilities. The interest was allocated based upon each facilities' proportionate net investment value (cost).

After the sale/leaseback transaction, WAPA was no longer responsible for any interest charges from AVS II, including interest from the $99.5 million in unretired AVS II debt. According to Basin, it eliminated AVS II interest as a cost category to WAPA, but properly continued to charge WAPA for its share of the common facilities' interest. The $99.5 million was still in the pooled AVS debt, however, and interest from the $99.5 million still accrued. When Basin allocated the pooled interest to AVS I and the common facilities (AVS II having been eliminated because of the sale/leaseback), a part of the interest from the $99.5 million was allocated to the common facilities. Then, once the common facilities' interest was allocated to AVS I and AVS II for the purposes of determining the cost of power, a portion of the interest from the unretired $99.5 million was allocated to AVS II. Thus, when Basin billed WAPA for common facilities' interest, the bill included a small portion of the interest from the unretired $99.5 million, for which Basin admits WAPA should not have been responsible.

Apparently no one complained about this overcharge during the contract period, and it was only when Norbeck threatened to "blow the whistle" on several of

Basin's transactions that Basin took action.[6] After receiving Norbeck's "whistle blower" letter, Basin reviewed its bills to WAPA. Soon after, Basin informed WAPA that it had been overcharged an amount in excess of $1 million, and that Basin would shortly refund the money to WAPA.[7] Basin eventually sent WAPA approximately $2.4 million as payment for the overcharge (including interest), which WAPA accepted without complaint.

Several years after the $2.4 million refund, Norbeck was fired and proceeded with this False Claims Act complaint. The Government considered intervening and hired the accounting firm of KPMG to do an audit of the Basin-WAPA relationship. KPMG initially determined that Basin owed WAPA $13 million more than the $2.4 million Basin had already returned. KPMG arrived at this number by assuming that Basin kept separate pools of debt for AVS I, AVS II, and the common facilities. With that in mind, KPMG then assumed that the $99.5 million

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[6] Based upon Norbeck's whistle blower letter, the district court believed that Norbeck was well aware of this overcharge. This is not the case. Norbeck's letter did refer to an audit done on a similar contract, but the letter does not indicate that Norbeck was aware of any overcharge. Indeed, Norbeck's brief admits that he was unaware of the outcome of the previous audit and that his letter merely questioned the conclusions of that audit.

[7] The parties agree on the sequence of events, but disagree about the motivation. Basin claims it honestly undertook an audit of its transactions once it received the Norbeck letter and determined the amount of the overcharge in good faith. Norbeck claims that Basin fraudulently determined the amount of the overcharge, sending WAPA a lesser amount in the hopes that WAPA would not notice the real overcharge.

in unretired debt stayed in the AVS II account and that Basin continued to charge WAPA for its share of this remaining AVS II interest, in addition to the lease payments. Based upon these assumptions, KPMG determined that Basin overcharged WAPA in excess of $15 million, rather than the $2.4 million that Basin had already returned.

Once the KPMG audit was complete, Basin challenged KPMG's assumption that it maintained separate pools of debt for the AVS facility. KPMG investigated whether its assumption was correct, and the guarantors of Basin's debt confirmed to KPMG that Basin kept all AVS debt in a single pool. Once KPMG learned this, it withdrew its conclusion that Basin owed WAPA in excess of $15 million.

Norbeck pursued the sale/leaseback issue, however, and the district court held in his favor. The district court's opinion relied exclusively upon the testimony of Lester Heitger, an accounting professor who testified as an expert for Norbeck. Norbeck relies upon three arguments to support the district court's verdict.

First, Norbeck relies on the evidence admitted at trial showing Basin intentionally used $99.5 million of the proceeds from the sale of AVS II to pay off non-AVS debt. Norbeck consistently characterizes this as a misappropriation of funds, and believes the intentional use of this money to pay off non-AVS debt supports the district court's judgment.

Norbeck next relies on Heitger's review of the KPMG audit. Heitger testified that he reviewed the KPMG audit,

and he believed that the KPMG audit correctly determined that Basin overcharged WAPA by $15.5 million. Heitger's review of the audit was limited, however, to checking KPMG's work; he did not conduct a new audit.

Norbeck's third argument relies on Heitger's "parallel construct," which Heitger referred to several times. (Trial Tr. of Lester Heitger at 136-37). Norbeck begins by pointing out that Basin received approximately $623 million from the sale of AVS II. Of that $623 million, Basin used $99.5 million to pay off non-AVS debt. Thus, approximately sixteen percent of the AVS II proceeds was, to use Norbeck's characterization, misappropriated. Norbeck then points out that WAPA paid $87.2 million in lease costs for AVS II during the contract period. Norbeck concludes that, had Basin not misappropriated the $99.5 million, WAPA's lease costs would have gone down by sixteen percent. Thus, sixteen percent of $87.2 million is a little over $13 million. When multiplied by a cost of money factor, this sum becomes close to the amount the district court found Basin overcharged WAPA.

On appeal, Basin argues that neither the district court nor Norbeck point to any competent evidence supporting the judgment. Further, Basin points out that it introduced its actual billing statements to WAPA, and Norbeck did not use those billing statements to prove his case.[6] Finally, although Norbeck has the burden of proof on his contract claims, Basin points out that it did introduce evidence, through the testimony of Ms. Shawn Deisz, an

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[6] We note that Norbeck admitted at oral argument that an examination of Basin's bills to WAPA would not reveal an overcharge.

executive in Basin's accounting department, that supports Basin's description of how the overcharge took place. Basin argues Deisz's testimony is the only direct evidence of the amount of the overcharge.

B. Amount of Overcharge

We believe the district court committed clear error in holding that Basin overcharged WAPA $15.5 million. Although the district court relied upon Heitger's expert testimony, which Norbeck contends should be sufficient to support the judgment, a close examination of Heitger's testimony reveals that neither of his arguments withstand scrutiny. Also, Norbeck's attempts to characterize Basin's use of the $99.5 million as "misappropriation" misses the mark, and cannot support the judgment.

Norbeck's brief consistently attempts to characterize Basin's use of $99.5 million of AVS II proceeds on non-AVS debt as a misappropriation, suggesting that this misappropriation supports the judgment. We find several flaws with this position. First, it appears to us that Basin's use of the $99.5 million was not inappropriate. Basin was free to do whatever it wanted with the proceeds from AVS II, including spending that money on non-AVS debt. Admittedly, Basin had an obligation to deal with the consequences of such a transaction correctly, and in this situation, it meant ensuring that WAPA would not be charged for interest from the unretired $99.5 million. Basin admits as much. This leads, however, to the second problem with Norbeck's argument. Simply saying that the $99.5 million was "misappropriated" does not provide any evidence of how much WAPA was overcharged.

Even if the $99.5 million was "misappropriated," that is not evidence of the actual amount of the overcharge to WAPA. Norbeck does not cite to any evidence, other than the abandoned KPMG audit, suggesting interest from the $99.5 million was directly allocated to AVS II (as the KPMG audit incorrectly assumed). Thus, this argument fails to support the amount of the judgment.

With respect to Heitger's analysis, he first testified that the amount of the judgment was supported by the KPMG initial audit.[9] This overlooks, however, the fact that the KPMG audit was based upon the faulty assumption that Basin separated each of the AVS facilities' debt. As the unrebutted testimony of Arvle Hix, an accountant with KPMG who worked on the Basin audit, shows, KPMG determined this assumption was incorrect, and later abandoned the conclusion in the initial draft that Basin overcharged WAPA $15.5 million.[10]

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[9] Although Heitger relied upon the KPMG audit, he did not independently recalculate this audit. Rather, he testified that he "redid that [KPMG] calculation" and "concluded that it was an appropriate calculation." (Trial Tr. of Lester Heitger at 130).

[10] Q. Okay. I neglected to ask you something I wanted to address. When you went back . . . and found out that the debt for AVS was pooled, were any of the claims or any of the issues in your audit report abandoned as a result of those consultations?

A. Yes.

Q. What issue or claim was abandoned as a result of that investigation?

A. That first issue on the leveraged lease transaction.

Although Heitger checked KPMG's calculations to make sure they were correct, his testimony does not support the faulty assumption of separate debt upon which the entire KPMG audit was based. In fact, he specifically acknowledged that Basin pooled all of its debt. (Trial Tr. of Lester Heitger at 132-33). Since neither Heitger nor Norbeck have presented any evidence that suggests KPMG's initial (and later abandoned) assumption was correct, Heitger's support for the KPMG audit proves nothing. All Professor Heitger could correctly testify to was that *if* KPMG's assumptions were correct, *then* the KPMG figures were correct. However, he failed to provide any evidence that KPMG's assumption was, in fact, correct.[11] We believe, therefore, that Heitger's approval of the KPMG audit, when KPMG backed away from its own conclusions, cannot support the district court's judgment.

Professor Heitger's "parallel construct" argument fails for several reasons. First, the argument is based upon the assumption that Basin misappropriated the $99.5 million it spent on non-AVS debt. As we discussed earlier, Norbeck gives us no reason to believe the $99.5 million was misappropriated. Further, even if the money

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Q. Okay. And just so the record is clear on that, was that the issue about whether or not the refund that was ultimately made to WAPA should have been 2.4 million dollars or 13 million dollars?

A. Yes, I think so.

(Trial Tr. of Arvle Hix at 74).

[11] We further note that the district court specifically found that Basin's debt was in a single pool.

was misappropriated, Norbeck cannot show any connection between the misappropriation and WAPA's lease cost.[12] Basin and the outside investors negotiated the price of AVS II before it made any use, appropriate or inappropriate, of the funds. What Basin would do with the funds from the sale of AVS II did not affect the negotiations for the lease price of AVS II, which, of course, determined WAPA's lease costs. Therefore, the parallel construct argument fails since Norbeck can show no connection between Basin's use of the $99.5 million and WAPA's lease costs.

We find no evidence to support the district court's award of damages past the $2.4 million Basin already returned to WAPA. Norbeck has thus failed to meet his burden of proving Basin overcharged WAPA in excess of the $2.4 million, and accordingly, we reverse the district court's award of $13.05 million in contract damages.

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[12] Heitger even testified (seemingly contrary to his own "parallel construct") that the lease costs would not have been altered by the "correct" application of the $99.5 million:

Q. (THE COURT) That cuts to the question: Would a lease amount have been lower in the cost factor to WAPA if the 99.5 million had been applied properly, under your terms? Would the lease payment have been lower?

* * *

A: Well, answering the first question, is that the lease payment, itself, would probably not have been lower because they would have then all been properly applied.

(Trial Tr. of Lester Heitger at 137-38).

C. Multiplied Damages Under the False Claims Act

The district court found that Basin's overcharge of the interest from the $99.5 million was done with the level of intentionality required for multiplied damages under the False Claims Act. *See* 31 U.S.C. § 3729(a). Although we have reversed the district court's award over the $2.4 million Basin already returned to WAPA, we still must determine whether Basin overcharged the Government this $2.4 million with the level of intentionality required for the False Claims Act's multiplied damages provisions.[13]

In order for Basin to be liable under the False Claims Act, it must have submitted the false claims with the requisite mental state.[14] The lowest level of intentionality that satisfies the False Claims Act is "act[ing] in reckless

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[13] The district court did not subject the $2.4 million Basin returned to WAPA before trial to the False Claims Act's multiplied damages provisions, apparently reasoning that since Basin voluntarily returned the money, it should not be subject to these provisions. Norbeck and the Government appeal this decision. If the district court was correct, then we would not have to decide whether the $2.4 million overcharge was submitted in violation of the False Claims Act, since the amount would not be subject to the False Claims Act's multiplied damages provisions. Since we find no evidence to support the district court's finding of fraud in the first place, we need not reach this issue.

[14] The False Claims Act, including the intent standard, was significantly modified in 1986. As this circuit recently indicated, the 1986 False Claims Act intent modification did not alter the law in the Eighth Circuit. *See Miller v. Federal Emergency Management Agency*, 57 F.3d 687, 690 (8th Cir. 1995).

disregard of the truth or falsity of the information." *See* 31 U.S.C. § 3729(b)(3). "The improper interpretation . . . of a contract," however, "does not constitute a false claim for payment." *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 329 (9th Cir. 1995). Rather, something beyond mere negligence, but falling short of specific intent, must be shown for liability to attach. *See United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 60 (8th Cir. 1973) (holding False Claim Act intent standard was satisfied when defendant submitted his false claim in an "extremely careless and foolish" manner); JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 2.04(c)(1) (2nd ed. 2000) ("To avoid summary judgment for the defendant [under the False Claims Act], admissible, credible evidence of a knowing false statement is required.").

The district court gave three reasons for its finding that Basin overcharged WAPA with the required intent. First, the district court held that Basin "knew that interest on the remaining debt of the AVS [project] was being allocated in part as an expense item, in addition to the lease payments, in computing [WAPA's cost]." Despite this knowledge, "Basin Electric made a deliberate decision to retire other debt" with AVS II proceeds, which led to "a continuing overcharge" to WAPA. *United States v. Basin Elec. Power Coop.*, No. A1-95-003 slip op. at 22 (D.N.D. Mar. 26, 1999). Second, the district court noted that once Norbeck sent his letter, the audit team investigating the overcharge "deliberately selected an assumption that the $99,500,000 payment did not have to be applied to that portion of the remaining debt being charged to WAPA, (AVS Unit II and 50% of the common area)." *Id.* at 23. Finally, the district court held that both

these factors, "when linked to the myriad of small edges taken by Basin Electric" in determining costs under the contract "satisf[ies] the fraud requirement under the False Claims Act." *Id.* at 23. We believe each of these reasons lack merit.

First, Basin no doubt knew that interest on the remaining pooled AVS debt was being allocated, in part, to WAPA. This was entirely appropriate, since even after the sale and leaseback of AVS II, WAPA was still responsible for a share of the common facilities' interest. It is also uncontested that Basin "made a deliberate decision" to retire non-AVS debt with $99.5 million from the AVS II sale. Again, this was entirely appropriate, since Basin could do whatever it wanted with the proceeds from AVS II so long as it dealt with the consequences correctly. Finally, it is also uncontested that this decision indirectly led to a continuing overcharge to WAPA. Basin admitted as much when it returned the $2.4 million.

What is lacking from this analysis is any evidence that Basin knew, or acted in reckless disregard, of the possibility that any of the interest from this $99.5 million was actually charged to WAPA. The only intentional act the district court pointed to was the discharge of non-AVS debt, and Basin attempted to deal with the consequences of this act by eliminating interest from AVS II as a cost category in WAPA's bills. Nowhere does the district court or Norbeck point to any evidence that Basin knew that interest from the $99.5 million was charged to WAPA

through a back door, i.e., through interest payments from the common facilities.[15]

Second, the district court holds that the audit team reviewing the Basin-WAPA contract "deliberately selected an assumption" that the $99.5 million should be applied to the pooled AVS debt, rather than to only the "portion of the debt remaining being charged to WAPA." This, however, reflects the district court's misunderstanding of the situation, since Basin did not maintain separate pools of debt such that it could apply the $99.5 million directly to a certain portion of AVS debt. Had Basin used the $99.5 million to pay off AVS debt in the first place, it would have lowered AVS pooled debt – including debt that was attributed to AVS I. It was entirely appropriate, therefore, for the audit team to assume, in determining the amount of the overcharge, that the *pooled* AVS debt would have been reduced by $99.5 million. If the audit team assumed the $99.5 million was somehow applied only to debt directly charged to WAPA, the result would be a refund greater than the original overcharge, since, as discussed above, only a small portion of the interest from the $99.5 million was ever charged to WAPA in the first place.

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[15] It appears that the district court's analysis is infected with the same error as Norbeck's argument: that Basin's decision to use $99.5 million of AVS II proceeds on non-AVS debt was somehow inappropriate. The correct question is whether Basin knew it was overcharging WAPA, not whether Basin knew it was paying off non-AVS debt. The district court did not point to any evidence of this.

Even if the district court was correct that the $99.5 million should have somehow been applied directly to debt charged to WAPA, it provides no evidence that the audit team knew or acted in reckless disregard of the possibility that its assumption was incorrect. The audit team's deliberate choice of this assumption cannot be fraud if they honestly believed it was a correct assumption, and the district court does not point to any evidence suggesting that was the case.

Finally, the district court's reliance on the "small edges" taken by Basin in the various areas of cost computation cannot support its decision. The district court found that all of Basin's other overcharges were just "simple contract breaches." *Id.* at 24. But as we mentioned above, the mere misinterpretation of a contract cannot be the basis of a False Claims Act violation. All of these other "simple contract breaches," therefore, cannot provide evidence of a knowing violation of the Act.

Other than repeating the arguments of the district court, the only evidence Norbeck points to that could arguably support the finding of fraud are Basin documents discussing Basin's intent to use AVS II proceeds to pay off non-AVS debt. For example, Norbeck points to a September 25, 1985 internal memo that he claims demonstrates that Basin knew it was defrauding WAPA. But all this document does to support Norbeck's position is show that Basin intentionally used $99.5 million from the sale of AVS II to settle non-AVS debt. As we have mentioned several times, this decision was not inappropriate. These documents do not support the proposition that Basin dealt with the consequences of this decision fraudulently. They do not show that Basin knew that interest

from the $99.5 million in unretired debt would get charged to WAPA through the common facilities. As with much of Norbeck's argument, he relies upon the alleged misapplication of the $99.5 million from the AVS II sale to support his argument, when such use of the money was not a misapplication in the first place.

We believe Norbeck failed to introduce evidence showing Basin overcharged WAPA beyond the $2.4 million Basin returned before trial. For this reason, we find the district court erred in determining that Basin overcharged WAPA more than this $2.4 million. We further believe that Norbeck has failed to provide any evidence that Basin submitted these payments with the reckless disregard for the truth necessary under the False Claims Act. We therefore reverse the district court's judgment against Basin on this issue.

PART III. TEN-YEAR VS. TWENTY-YEAR AMORTIZATION PERIOD

A. Background

Basin next appeals the district court's ruling that it breached the Basin-WAPA contract by choosing a ten-year amortization period for the AVS common facilities. Both Norbeck and the Government argue the district court correctly held Basin's ten-year amortization period breached the contract. We agree with Basin and reverse the district court's award of damages.

Generating and Transmitting ("G & T") businesses, like Basin, make huge investments in plants and facilities. G & T's need to recover these costs, but to attempt to recover their investment in the first few years of a plant's

operation would lead to outrageous prices for consumers. Therefore, G & T's commonly amortize these costs by spreading them into rates over a period of years. This ensures that rates remain stable and that G & T's recover their investment.

In line with this practice, Basin decided to amortize the costs of the common facilities into rates over a lengthy period. Although Basin used a twenty-year period for the common facilities at another power station (the Laramie River Station ("LRS") completed in the late 1970s), it chose a ten-year amortization period for the AVS common facilities. This ten-year period increased the amortization rate and raised prices to WAPA approximately $3.6 million over the life of the Basin-WAPA contract. The Government claims that Basin's choice of a ten-year amortization period violated the implied covenant of good faith present in every contractual relationship.

The Basin-WAPA contract allowed Basin to amortize common facilities' investment into WAPA price rates. No contractual provision required Basin to choose any particular amortization period, so long as the method for calculating the amortization rate was consistent with applicable RUS and GAAP rules. The Government does not contend that the choice of a ten-year period violated these rules. Instead, the Government argues Basin breached the implied covenant of good faith, pointing to the choice of a twenty-year amortization period for common facilities at the LRS station, an internal Basin memorandum suggesting a twenty-year amortization period was more in line with the useful life of the AVS common facilities, and Basin's switch to a twenty-year period shortly after the end of the Basin-WAPA contract.

While the Government relies on this evidence to argue Basin acted in bad faith, Basin tells a different story. According to Basin, its outside auditor, Coopers and Lybrand ("Coopers"), required it to choose a ten-year amortization period. Coopers apparently felt that Basin's twenty-year amortization period did not guarantee that Basin would recover its investment in the common facilities quickly enough. Basin admits that it switched to a twenty-year period shortly after the Basin-WAPA contract ended, but argues it did so only because Coopers finally agreed that a twenty-year period was appropriate for the AVS facility. The Government and Norbeck believe Basin's explanation is a smokescreen and assert that Basin chose the ten-year amortization period simply to raise prices to WAPA.

Apparently disturbed that Basin had used a twenty-year amortization period at the LRS project, and that Basin reverted to a twenty-year period for the AVS common facilities shortly after the Basin-WAPA contract expired, the district court found for WAPA, holding that "the requirement for consistency and uniformity [is] controlling." *Basin*, No. A1-95-003, slip op. at 11. The district court agreed that the discussions relating to a ten-year amortization period between Coopers and Basin took place, and further conceded that Basin wisely feared its outside auditors. *See id.* at 9. The district court believed that if Basin did not satisfy Coopers' concerns regarding the amortization rate, Coopers "would be forced to issue a 'qualified' opinion, which could have serious consequences to the business being audited." *Id.* at 8. The district court believed, however, that "no witness or testimony carries [the discussions between Coopers and

Basin] into the Manager's office or into the Board Room of the Cooperative."[16] *Id.* at 9.

On appeal, the Government urges this court to affirm the district court's finding. Although the district court did not identify any specific legal ground for finding Basin breached the contract, and while no specific provision of the contract demanded that Basin choose any particular amortization period (as long as it complied with RUS rules), the Government believes that by choosing a ten-year period, Basin breached its implied duty of good faith and fair dealing.[17]

B. Analysis: Good Faith and Consistency

We review the district court's legal conclusions, including the application of accounting principles, *de novo*. *See Hercules Inc. v. United States*, 626 F.2d 832, 835 (Ct.Cl. 1980) ("the application of accounting rules to a finite problem raises an issue of contract interpretation, which is an issue of law."). The application of the implied

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[16] The district court's finding that "no witness" carried Coopers' concerns into the manager's office is clearly erroneous. Both Robert McPhail, the General Manager of Basin, and Howard Easton, the head of power marketing, testified that they wanted to use a twenty-year amortization period for the AVS common facilities, but were prevented from doing so by Coopers. (Trial Tr. of Robert McPhail at 25-26; Trial Tr. of Howard Easton at 28-29, 50, 62-63).

[17] Norbeck also asks us to reverse the district court's finding that Basin did not submit these charges in violation of the False Claims Act. Since we reverse the district court's finding that Basin committed a breach of contract, we have no need to discuss this issue.

covenant of good faith is also an issue of contract interpretation that we review *de novo*. *See Taylor Equipment, Inc. v. John Deere Co.*, 98 F.3d 1028, 1031 (8th Cir. 1996). Federal common law governs the interpretation and construction of a contract between the United States and another party. *See United States v. Applied Pharmacy Consultants, Inc.*, 182 F.3d 603, 604 (8th Cir. 1999); *United States v. Tharp*, 973 F.2d 619, 620 (8th Cir. 1992). When applying the "federal common law" of contracts, "that law must take into account the best in modern decision and discussion." *Montana Power Co. v. United States*, 8 Cl.Ct. 730, 735 (Cl.Ct. 1985).

The Government correctly urges every contract implies that each party will act in good faith. *See Restatement (Second) of Contracts*, § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). Courts must be careful when considering good faith, however, as it does not imply "an everflowing cornucopia of wished-for legal duties." *Comprehensive Care Corp. v. RehabCare Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996). Nor should good faith be construed to "give rise to new obligations not otherwise contained in the contract's express terms." *Id.*

The good faith covenant does not impose a general requirement that a party act reasonably. Rather, the covenant acts merely as a gap filler to deal with circumstances not contemplated by the parties at the time of contracting. *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990) ("Good faith is a compact reference to an implied undertaking not to take opportunistic advantage in a way that could not have been contemplated at the time of [the contract's] drafting,

and which therefore was not resolved explicitly by the parties.") (quotations omitted). Since good faith is merely a way of effectuating the parties' intent in unforseen circumstances, the implied covenant has "nothing to do with the enforcement of terms actually negotiated" and cannot "block [the] use of terms that actually appear in the contract." *Continental Bank, N.A. v. Everett*, 964 F.2d 701, 705 (7th Cir. 1992).

The Basin-WAPA contract gave Basin broad authority to determine its costs, as long as the determination satisfied RUS and GAAP requirements. We think it clear that the good faith duty did not require Basin to choose a particular amortization period. As the Tenth Circuit explained in *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1267-68 (10th Cir. 1988):

> [I]t is possible to so draw a contract as to leave decisions absolutely to the uncontrolled discretion of one of the parties and in such a case the issue of good faith is irrelevant. . . . [in such case] the parties expressly contracted for the unconditional right and thus they cannot reasonably expect any special implied protection.

This conclusion is in accord with the purpose of the covenant to "protect the reasonable expectations of the parties by implying terms into agreement." *Id.* at 1267 (quotations omitted). Our review of other legal authorities convinces us that the *Big Horn Coal* approach is a sound one.

For example, in *Barseback Kraft AB v. United States*, 36 Fed. Cl. 691 (Fed. Cl. 1996), the court faced a remarkably similar dispute involving the implied duty and one

party's authority to set prices. Two foreign utilities contracted with the United States Enrichment Corporation (USEC) for the sale of uranium enrichment services. The foreign utilities argued that the USEC breached its Uniform Commercial Code ("U.C.C.") duty of good faith by setting unreasonable prices. Although the court rejected the application of the U.C.C., it noted, referring to the common law duty of good faith, that "there are Federal Government contract/common law principles paralleling the U.C.C. that could provide similar protections to the plaintiffs." *Id.* at 705. The court nevertheless rejected the application of the common law duty of good faith because "the parties contracted for a pricing provision that provides the USEC with the discretion to set the price for contracts. Both parties were aware, and the contracts specifically allowed, that the USEC could unilaterally establish prices under the contracts." *Id.* at 706. Thus, where a contract gives broad discretion to set prices to one of the parties, the court held it was inappropriate to use the implied covenant to, in effect, rewrite the bargained-for terms of the contract by limiting the price-setting party's discretion.[18] *See also Taylor*, 98 F.3d at

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[18] The *Barseback* court identified a second ground for refusing to apply the good faith doctrine, which applies here as well. The *Barseback* court was "unwilling to infer a good-faith limitation on the USEC's pricing discretion because the contracts already include[d] a significant, bargained-for limitation on the USEC's pricing discretion." *Barseback Kraft AB*, 36 Fed. Cl. at 706. This limitation was a "ceiling price" on costs, determined by a formula that accounted for electrical prices and the purchasing power of the dollar. This ceiling was a "significant limitation" on the USEC's authority to set prices for which the "plaintiffs bargained." *Id.* Likewise, Basin was

1031-33 (holding implied covenant of good faith should not be used to rewrite a contract provision that gives broad discretion to one of the parties).[19] *Cf. Hubbard Chevrolet Co. v. General Motors Corp.*, 873 F.2d 873, 877-78 (5th Cir. 1989) (holding implied covenant had "no role to play" in a dispute over refusal to approve dealer's relocation because the contract gave the party discretion to reject relocation).

The present case falls within this line of cases. The contract provided Basin with discretion to determine its costs, so long as such costs fell within applicable RUS and GAAP rules. To use the good faith covenant to limit Basin's discretion to choose rates would require us to rewrite the contract and give WAPA benefits for which it did not bargain. Beyond being unfair to Basin, "in commercial transactions, it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.).

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limited in its authority to set prices by applicable RUS and GAAP rules. Just as the *Barseback* court, we are "unwilling to add protections beyond those significant contractual safeguards in place and for which the plaintiffs bargained." *Id.*

[19] We should note that the *Taylor* case identified a second line of cases that provide a limited role for the implied covenant in discretionary situations. Although the *Taylor* court appeared to prefer our approach, the facts of the case were such that the court did not need to decide which line of cases South Dakota courts would follow. Under this second line of cases, the implied duty demands that the party with discretion act honestly when using that discretion. *See Taylor*, 98 F.3d at 1033-34; *Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd.*, 970 F.2d 273, 280 (7th Cir. 1992).

The district court held that the requirement for consistency was controlling. The district court did not explain why consistency was controlling, but on appeal, Norbeck argues that consistency was required by GAAP.[20] We believe the district court erred as a matter of law, however, in applying the rule of consistency. Consistency is only one of many elements of GAAP and it should not be applied in a mechanical manner. *See Thor Power Tool Co. v. C.I.R.*, 439 U.S. 522, 544 (1979) ("Generally accepted accounting principles, rather, tolerate a range of reasonable treatments, leaving the choice among alternatives to management.") (quotations omitted). The rule of *Thor* limits the district court, in reviewing an accountant's work, to deciding only whether the accountant chose a procedure from "the universe of generally accepted accounting principles." *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 315 (5th Cir. 1988). Further, the GAAP principles must be examined in relation to the type of business involved. *See id.; Pittsburgh Coke & Chem. Co. v. Bollo*, 560 F.2d 1089, 1092 (2d Cir. 1977). Thus, the district court's review was limited to determining whether the accounting principle of consistency *demanded* Basin treat the AVS and LRS common facility amortization rates consistently.

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[20] The Government's brief mentions the principle of consistency, but does not argue that Basin violated GAAP rules, relying instead on the good faith covenant. In fact, one of the Government's witnesses testified that Basin's amortization rate did not violate GAAP. (Trial Tr. of Ned Christiansen at 163; *see also* Trial Tr. of Arvle Hix at 58-59). Norbeck alone argues that Basin's treatment violates GAAP, and he relies on the testimony of Heitger.

We believe the district court erred in applying consistency to this issue. As the Government's brief indicates, the accounting principle of consistency requires that *like* transactions be treated the same, and as the district court's findings indicate, the treatment of G & T amortization rates changed dramatically between the time the LRS and AVS stations were complete. *See Basin*, No. A1-95-003, slip op. at 8-9. Because G & T's dramatically overbuilt capacity during the 1970s, there was a great concern that G & T's would be unable to recover up-front expenditures on projects like the AVS facility. *See id.* at 8. As a result, the FASB enacted FAS 71, which establishes the GAAP that amortization rates must be based upon a reasonable rate of recovery. *See id.* The lack of a specific time table, and continuing concerns about long amortization rates, caused the FASB to try to amend FAS 71 through the adoption of FAS 92. FAS 92 sought to limit a new amortization period to a maximum of ten years.[21] *Id.* at 8-9.

The Government and Norbeck argue that FAS 92 never bound Basin, but this argument misses the point. FAS 71, FAS 92, and the continuing concern over amortization rates, show that the LRS facility and the AVS facility were not similarly situated. Whether or not Basin was bound by FAS 92 does not alter the fact that Basin (and Coopers) had every reason to be concerned over a twenty-year amortization period. For the district court to

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[21] FAS 71 was adopted in 1982, after Basin began amortizing the LRS common facilities, but before Basin adopted the ten-year amortization period for the AVS common facilities. FAS 92 was proposed and finally adopted several years later.

require that the AVS project and the LRS project be treated consistently turns the accounting principle of consistency into a wooden rule that is applied mechanically without taking into account changing circumstances and the range of reasonable alternatives available to accountants. *See Thor*, 439 U.S. at 544 ("Accountants long have recognized that generally accepted accounting principles are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions.") (quotations omitted).

Two sophisticated commercial entities, Basin and WAPA, entered into a contract that gave Basin discretion to set prices within RUS rules and GAAP. Basin used a ten-year amortization period for the common facilities, which fully complied with these requirements, and set its prices accordingly. Since there is no question that Basin fully complied with the negotiated contract terms, we believe that the implied covenant of good faith should not be used to give WAPA more protection than for which they actually bargained.

For these reasons, we hold the district court erred in finding Basin breached its contract with WAPA by choosing a ten-year amortization period. We therefore reverse the district court's judgment against Basin relating to the ten-year amortization issue. In view of the fact that we find no breach of contract, Norbeck's appeal on the fraud issue, which the district court dismissed, is no longer a viable claim.

PART IV. IMPUTED INTEREST

A. Background

Norbeck on cross-appeal claims that Basin, with reckless indifference, breached its contract with WAPA by imputing post-construction interest on its general fund loan to the AVS project and charging that interest to WAPA.[22] According to Norbeck, imputing interest in this manner violated the terms of the contract, as well as GAAP. Basin maintains that it did not breach the contract by billing WAPA for its share of imputed interest on the general fund loan. Although Basin acknowledges that it computed the cost of borrowing from its general fund and charged WAPA its proportionate share, it maintains that its actions were within the four corners of the contract. According to Basin, the contract only prohibited Basin from including imputed interest on its financial statements, which it did not do.

The district court did not determine whether Basin in fact charged WAPA for imputed interest or whether imputing interest violated the Basin-WAPA contract. Rather, it concluded that "whatever Basin Electric may have done or not done with interest on General Fund investment in AVS Unit II after it came on line, is justified in view of its structure" as a member cooperative. *Basin*, No. A1-95-003, slip op. at 20. Acknowledging its foray from the record, the court analogized Basin to an investor-owned utility and assumed that Basin's general fund was comprised of surplus dollars from Basin's business

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[22] Norbeck brings this claim under the False Claims Act. The Government supports his position in its briefs.

operations, which were to be refunded to the members based on their share of business with Basin.[23] *See id.* As such, the court reasoned that the general fund loan was not drawn from Basin's equity capital, but that it was more akin to a loan from Basin's members.

Basin financed much of the AVS project with borrowed funds that were guaranteed by the RUS. However, at some point during the construction period the relationship between Basin and RUS was disrupted by disagreement on a separate issue. RUS refused to guarantee further funds for the AVS project until the disagreement was resolved. Because it could not attain RUS-guaranteed funding, Basin borrowed from its own general fund to finance continued construction of the AVS project.

The parties do not dispute the legitimacy of Basin's general fund loan to the AVS project. What is disputed is the extent to which the Basin-WAPA contract allowed

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[23] The district court's characterization of Basin's general fund differs somewhat from Basin's own characterization. When asked to describe Basin's general fund at trial, Shawn Deisz testified as follows: A good portion of those funds come from our membership. Members loan us money, per se, through what we call the member investment program. Basin Electric allows its members to lend money to Basin. We pay them a return on it, and because we are able to accumulate those dollars or those investments in a larger pot, the purpose of that is so that we can earn a higher rate of return for the members and they can get a better rate than going down to their bank and putting the money in. So they invest a large amount of money with us and that comprises a good portion of the general fund. (Trial Tr. of Shawn Deisz at 117).

Basin to impute interest on this loan and include that interest as a cost of power to WAPA.[24]

Imputed interest is a term that takes on a variety of meanings, depending on the context in which it is used. In a general sense, imputed interest is an accounting fiction that describes the time value of money. In the instant case, imputed interest refers to the interest charges on Basin's general fund loan to the AVS project, which was an internal borrowing transaction. On Basin's books, the loan resulted in an interest charge to the AVS project and an interest income entry to the general fund. However, these bookkeeping entries did not result in actual interest payments, or cash inflows to and outflows from those accounts. Thus, the interest was imputed from one set of Basin's books to another, and not actually paid.

To understand the imputed interest issue presented in this case, it also is necessary to understand the RUS System, which is the organizing principle for determining costs under the Basin-WAPA contract. RUS is an agency of the United States Department of Agriculture that provides financing and technical assistance to utilities in rural America. One of RUS's functions is to guarantee loans for rural electric cooperative projects. Central to

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[24] The interest at issue is attributable to the AVS common facilities. WAPA purchased power from AVS II, which used a part of the common facilities to generate that power. Accordingly, interest charges from the common facilities were associated with producing power generated from AVS II and Basin included it as a cost of power under the Basin-WAPA contract. Interest on financing for AVS II is not at issue in this case because when Basin sold and leased it back, Basin's lease costs replaced the interest costs for that facility.

RUS's loan-making process is its assessment and regulation of a cooperative's financial condition. For this reason, the RUS adopted the RUS System, which provides accounting methodologies and procedures so that the RUS accurately can assess "all of the dealings, business and affairs of the borrower." 7 C.F.R. § 1767.11. Although the RUS System is used to regulate and assess the financial viability of rural electric utilities, it does not purport to describe any method for utilities to bill purchasers. Nevertheless, the Basin-WAPA contract provided that each month Basin would determine its fixed costs for producing power from AVS II based on the summation of sixteen accounts from the RUS System.

The RUS System account at issue in this case is "427-Interest." The regulations provide that account 427 "shall include the amount of interest on outstanding long-term debt issued or assumed by the utility." 7 C.F.R. § 1767.23. The definition does not mention imputed interest on general funds and the parties have not pointed to any other part of the regulations that discusses or defines the term.

The experts who testified at trial agreed that imputed interest is a real and actual cost of getting an asset ready for service and an appropriate entry in account 427 during the construction period. When construction is finished, all interest costs (real or imputed, external or internal) incurred during the construction period are capitalized along with the other costs of construction and recovered from ratepayers through depreciation. From this point forward, interest is no longer capitalized but rather, is charged as an expense against operations and recovered through rates. The RUS System does not provide for imputed interest on a general fund loan after a

facility becomes operational. In contrast, the parties seem to agree that interest on funds from third party lenders may be included in account 427 both during and after construction.

When presented with a question about internal borrowing, Roberta Purcell, Chief of Technical Accounting and Auditing Staff at RUS, testified as follows:

> Q. Is there any problem – if you've got several divisions or projects or units within a cooperative, is there any problem with one of those divisions or projects borrowing money from the other and paying interest on that money?
>
> A. There's no problem with that. There's no restriction with that. That would be eliminated when you prepare Basin's books in total.
>
> Q. And if there was – truly was a loan that documented that relationship and that transaction, that wouldn't even be an imputed interest issue, would it, again as long as when you took the accounting for this division and this division and this division and put it together, you were not reflecting imputed interest?
>
> A. If you had a separate set of books for each division and one division actually loaned money to another and you had a note that represented that, in effect that would not be imputed interest. It would be interest for that particular division. But, again, it would be eliminated out in the consolidation of the divisions.

(Trial Tr. of Roberta Purcell at 41-42).

Norbeck claims that Basin knowingly overstated the cost of power to WAPA by imputing interest on the

general fund loan *after* AVS II went on-line. According to Norbeck, imputing interest in this manner violated the RUS System specified in the contract, as well as GAAP. Norbeck argues that imputed interest on general funds after the construction period does not fall under the RUS System's allowance for general funds used during the construction period and does not otherwise constitute interest on long-term debt under account 427. As for Basin's violation of GAAP, Norbeck relies on the premise that the Basin-WAPA contract was a cost contract.[25] According to Norbeck, only historical costs can be assigned to a cost contract and imputed interest is not a historical cost under GAAP. At the heart of Norbeck's argument is the notion that the general fund loan was not a loan at all. Rather, when the construction bills came in for the AVS project, Basin simply paid them from its equity reserves. Norbeck reasons that imputed interest was not the cost of borrowing funds in this case, but simply a mechanism for Basin to earn profit on equity capital it had in the bank.

In support of his position, Norbeck points to the terms of the Basin-WAPA contract, which adopt sixteen accounts from the RUS System for the purpose of determining the fixed cost component of power.[26] By adopting these accounts, Norbeck contends that Basin also was

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[25] The RUS System regulations define cost as "the amount of money actually paid for property or services." 7 C.F.R. § 1767.10.

[26] The cost of power under the contract also included "variable or energy related costs," for which a separate set of RUS System accounts were specified.

contractually obligated to adhere to the requirements of the RUS System, including the prohibition on allocating imputing post-construction interest to account 427. Specifically, Norbeck argues that because the contract, by virtue of adopting the RUS System, prohibits recording post-construction imputed interest in account 427, it also prohibits billing WAPA for post-construction imputed interest in account 427.

Norbeck insists that Purcell's testimony about internal borrowing was limited to a scenario involving an actual loan. The distinguishing characteristic, according to Norbeck, is that actual loans generate actual interest. In contrast, internal transfers such as the general fund loan in this case, involve imputed, or fictional, interest. To prove the fictional nature of the transaction, Norbeck points out that there are no documents or other evidence to prove the legal existence of the general fund loan or its terms, such as a note or repayment schedule. He also points to a Basin memo that characterizes the general fund loan as non-cash "dummy payments." This leads Norbeck to conclude that the general fund loan and imputed interest are accounting fictions that should not have been recorded in account 427 or charged to WAPA under the contract.

Basin responds that its accounting for imputed interest fully complied with RUS's requirements. The RUS System allows for imputed interest under account 427 because that interest is a legitimate component of the asset's value. In contrast, post-construction imputed interest is not a component cost of the asset and cannot be capitalized. If post-construction imputed interest were included in a cooperative's financial statements, it would

overestimate the financial strength of the cooperative and provide a faulty basis for the RUS's financing decisions. Basin explains that although it tracked imputed interest costs in account 427 both during and after construction, it did not compromise the integrity of the RUS System because that interest was eliminated on the company's consolidated books. The result, according to Basin, is that its financial statements accurately portrayed the value of the AVS facility in accordance with the requirements and goals of the RUS System.

Basin acknowledges that it would have been improper under the RUS System to *capitalize* account 427 imputed interest on the general fund loan after the construction period because doing so would inflate the value of the asset on Basin's financial statements. Thus, it did not capitalize these interest costs. It did, however, calculate the cost of borrowing from its general fund and allocate charges to account 427 for purposes of billing WAPA and other customers their share of those charges.[27] Basin explains that the cost of borrowing money to build the common facilities was associated with the cost of

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[27] In its initial brief on the issue, Basin suggests that its loan from the general fund is better characterized as a loan from its members. According to Basin, its general fund largely is comprised of funds its members invest through the membership investment program. The purpose of the program is for Basin to pool members' individual investments into a larger pot and earn a higher rate of return than what members otherwise would be able to earn by investing individually. Basin explains that it was entitled to calculate and charge interest on the general fund loan in order to ensure financial benefit to its members through the member investment program.

producing power from AVS II and therefore appropriately was billed to WAPA. Basin's position is that these interest charges are proper whether the source of funds is internal (Basin's general fund) or external (a third party lender).

Basin understands Purcell's testimony to mean that as long as post-construction imputed interest does not appear on its financial statements and is not capitalized, recording imputed interest in account 427 is allowed under the RUS System. Accordingly, Basin concludes that its methodology for computing interest on the general fund loan and charging WAPA its proportionate share, was entirely proper under the RUS System and by extension, the Basin-WAPA contract.

B. Analysis

Despite the accounting principles and contract law that weigh heavily in the balance, the resolution of this issue must be based on the legal principles underpinning the False Claims Act. As explained in Part II, the False Clams Act prohibits any person from knowingly presenting a false or fraudulent claim for payment or approval by the federal government. *See* 31 U.S.C. § 3729(a)(1). A prima facie case under the statute requires that (1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent. *Id.*

The rules surrounding imputed interest and their application in the context of the Basin-WAPA contract are not as straightforward as the parties would have this

court believe. As an initial matter, the Government, arguing on behalf of Norbeck, acknowledges that the RUS System does not prescribe a method for billing. This is an important consideration, given that the breach of contract alleged by Norbeck involves over-billing.

Equally troubling is Norbeck's reading of the regulations that purport to explain the proper implementation of the RUS System. Because post-construction imputed interest is not discussed in the regulations, Norbeck reasons that it is prohibited under 427 or any other account. This line of reasoning borrows from the legal maxim *expressio unius est exclusio alterius* (the expression of one thing excludes others not expressed) and we are not satisfied that it is appropriately applied in this case.[28] *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983) (rejecting application of the rule and embracing the idea that such canons "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose.") (quoting *Securities and Exch. Comm'n v. C.M. Joiner Leasing Corp.* 320 U.S. 344, 350-51 (1943)); *Bailey v. Federal Intermediate Credit Bank of St. Louis*, 788 F.2d 498, 500 (8th Cir. 1986) (noting that "[t]he applicability of 'expressio unius'

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[28] The Government broadly asserts that "the RUS Uniform System of Accounts quite clearly prohibits even recording imputed interest as a cost in Account 427, regardless of its effect on the financial statements." (Letter Br. for Govt. at 3). This prohibition is anything but clear. Although experts testified that imputed interest on general funds is allowed during construction but disallowed once a facility becomes operational, we find no place in the regulations that explicitly prohibits imputed interest from being recorded in account 427.

depends upon the intent of the drafters of a statute, and the maxim should be invoked only when other aids to interpretation suggest that the language at issue was meant to be exclusive."). Nothing in the regulations suggests that Basin's inclusion of post-construction interest for the purpose of billing AVS participants their proportionate share of that cost runs afoul of the RUS System. At minimum, we find that the regulations that govern RUS account 427 do not contain a mandatory exclusion of post-construction imputed interest for purposes of billing. *See United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999) (noting that where the issue is whether accounting practices complied with the federal Cost Accounting Standards there is a difference between regulations that are mandatory and those that are discretionary).

Based on the evidence in the record, we find that the transaction between Basin's general fund and the AVS project fits into the scenario presented to Purcell. Although it may not have been a separate unit or division of the company, the AVS project certainly was a "project" that was accounted for in a separate set of books. A schedule of repayment for the general fund loan to the project was recorded on a master amortization schedule along with other AVS debt. Despite that the source of the funds at issue was Basin's internal fund, rather than a third party lender, the transaction was nevertheless a loan. The regulations do not define what constitutes a loan under the RUS System. Courts have defined "loan" in a variety of contexts. After reviewing well-settled definitions of the term in other circuits, this court has stated that where one party advances money to another, who in

turn agrees to repay the loan with interest, there is a loan. *See United States Dept. of Health and Human Servs. v. Smith*, 807 F.2d 122, 124-25 (8th Cir. 1986). In this case, Basin's general fund advanced money to the AVS project. The amortization spread sheet indicates that the AVS participants were to repay the advance, with interest. This evidence is sufficient to have created a loan. When the accounting for the general fund and the AVS project were combined in Basin's consolidated books, no imputed interest was reflected. According to Purcell's testimony, this transaction does not create an imputed interest situation in the eyes of RUS.

If we view the transaction outside the strict confines of the RUS System, the ultimate resolution of the issue becomes more clear. Basin financed the construction of the AVS facility with loans from various sources, both external and internal. There is a cost of borrowing associated with such loans. The parties agree that there is no prohibition in the RUS System or otherwise in the contract that prohibited Basin from charging WAPA its proportionate share of interest expenses on a third party loan. Given our analysis of the general fund loan in this case, nothing in the contract prohibits Basin from charging WAPA its proportionate share of interest on the general fund loan.

A contract is to be interpreted in light of the totality of the circumstances that surrounded its formation, and the principal purpose of the parties is given great weight. *See Restatement (Second) of Contracts* § 202(1). To interpret the words and conduct of the parties to a contract, we must put ourselves in the position of Basin and WAPA at the time the contract was made. *See id.*, at cmt. b. The

Basin-WAPA contract was a cost contract. In other words, the contract provided that Basin would charge WAPA for the cost of producing the power WAPA purchased from AVS II. At the onset of the AVS project, and when the parties signed the Basin-WAPA contract, Basin anticipated that construction would be funded by loans from outside investors. It was not until 1983 that Basin had to borrow from its own general fund to finance construction of the AVS facility. Thus, at the time Basin and WAPA negotiated the contract, we must assume that WAPA understood its cost of power would include interest on the loans used to finance construction. We decline to interpret the contract in such a way that would reward WAPA, and Norbeck by extension, for an unanticipated course of events that shifted the source of money used to construct the AVS facility.

The question of whether Basin breached the Basin-WAPA contract is relevant, but not a conclusive factor in the analysis of Norbeck's False Claims Act claim. As we have noted, a breach of contract alone does not constitute a false claim for payment. *See Butler*, 71 F.3d at 329. Therefore, even if we were to find that Basin breached the contract by virtue of post-construction imputed interest charges, Norbeck must still satisfy the third element of his case: that Basin knew the claim was false or fraudulent.

Knowledge under the False Claims Act is civil in nature and a showing of specific intent to defraud is not required. *See* 31 U.S.C. § 3729(b). However, a Relator must, at a minimum, prove that the defendant acted with deliberate ignorance or reckless disregard for the truth or falsity of the information. *See id.* Our analysis of the

Basin-WAPA contract and the RUS System, in light of the facts of this case, led us to conclude that Basin's interpretation and performance under the contract was reasonable. *See Oliver*, 195 F.3d at 463 (explaining that the reasonableness of a defendant's interpretation of those standards are relevant to whether the defendant knowingly submitted a false claim). We find that Norbeck's claim under the False Claims Act fails because he did not prove that Basin acted with the requisite knowledge. Accordingly, we affirm the district court's dismissal of Norbeck's imputed interest claim.

PART V. COAL OVERCHARGE

On cross-appeal, the Government claims that Basin breached its contract with WAPA by overcharging WAPA for the cost of coal burned in AVS II. Under the Basin-WAFA contract, the cost of coal was a component part of the overall price of power. Basin would determine the cost of coal burned in AVS II, calculate WAPA's proportionate share, and plug that amount into the pricing formula used to calculate WAPA's monthly bill.

A number of factors went into Basin's determination of its coal costs. At issue in this case is a discount Basin received on the coal it purchased from the ANG Coal Gasification Company ("ANG") and a per ton amortization charge Basin included as a cost of power to help cover the expenses it incurred to finance the Freedom Mine.[29] The Government's claim for breach is twofold:

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[29] The supply chain of coal to AVS II was multi-faceted. For purposes of this case, the Freedom Mine sat at the beginning of

first, that Basin failed to include the full benefit of the coal quantity discount when it determined the cost of coal burned in AVS II; and second, that the spreadsheet Basin used to calculate the Freedom Mine amortization charge was fundamentally flawed such that WAPA was charged more than its share for the Freedom Mine expenses.

The district court found for Basin on both claims.

A. Coal Quantity Discount

1. Background

Basin and ANG had a dual contractual relationship whereby each bought from and sold to the other. Basin purchased coal for AVS I and AVS II from ANG pursuant to a Joint Coal Supply Agreement ("JCSA"). Under the JCSA, ANG sold the coal to Basin at a discount equal to approximately fifty-eight cents per ton of coal burned in AVS II.[30] *See* JCSA ¶ 5.6(a) (1). A related Power Supply

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the chain. The coal then traveled through the Dakota Coal Company, which was a subsidiary of Basin. Next the coal moved to the nearby gasification plant. Finally, ANG delivered the coal to the AVS facility where it was burned by AVS I and AVS II.

[30] ANG discounted the coal because Basin agreed to purchase "coal fines" (the smaller pieces of screened coal with a lower BTU content), which allowed ANG to use the larger pieces of coal with the higher energy value at the gasification plant. In exchange for buying the lower grade coal, Basin wanted ANG to cover a royalty charge Basin paid on each ton of coal it purchased from ANG. According to the trial testimony of Mark Foss, Basin's general counsel, the parties came to a "classic compromise:" ANG would pay half of the override that Basin otherwise would have to pay on the coal it purchased from ANG.

Agreement ("PSA") between Basin and ANG provided that ANG would purchase power from Basin at a rate that included the coal quantity discount defined in the JCSA. Although under the JCSA Basin's discount was based on the amount of coal burned in AVS II, the PSA provided that "[f]or Unit 1 and Unit 2 . . . Fuel and Fuel Related Costs shall also include the full benefit of the quantity discount" in the JCSA. PSA, Art. I.

The coal burned in AVS II was a "variable or energy related cost [ ]" under the Basin-WAPA contract. Since the coal quantity discount defined in the JCSA was based on the amount of coal burned in AVS II, the Government reasons that the entire discount should have been subtracted from the cost of coal burned in that facility. Had Basin allocated the discount in this way, WAPA would

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Foss testified that to arrive at half the override, the discount could have been based on the amount of coal burned in AVS I, the amount of coal burned in AVS II, or half the amount of coal burned in AVS I and II together. Ultimately, the discount was structured to provide Basin with an incentive to get AVS II on-line as soon as possible. ANG stood to benefit if the discount was based on the coal burned on AVS II because the PSA provided that once AVS II went on-line, ANG would pay a lower rate for the power it purchased from Basin. Basin, in turn, had an incentive to complete AVS II because the coal quantity discount was to take effect once that facility started burning coal

ANG applied the discount to Basin's monthly coal bill. For example, ANG's invoice to Basin for July 1986 lists the total amount of coal delivered to the AVS facility, "Less: Quantity discount for coal consumed by Unit II." Thus, although the discount was measured by the amount of coal burned in AVS II, the bill combined the total amount of coal delivered to AVS I and II.

have benefitted by paying a lower price for power from AVS II. Instead, Basin diluted the discount by subtracting it from the cost of coal for the entire AVS project, which included AVS I. Because the coal quantity discount was based on the amount of coal burned in AVS II, and cost-based contractors like Basin may not elect to retain the benefits of rebates or discounts that they obtain as a result of purchases made to fulfill the contract, the Government argues that Basin breached the contract by failing to pass on the entire discount to WAPA.

The Government rejects as irrelevant the PSA's treatment of the coal quantity discount. As an initial matter, the Government argues that the JCSA and the PSA are two separate agreements dealing with different subject matters: the former deals with coal and the latter deals with power. Moreover, the JCSA contains an integration clause, which states that the JCSA "supersedes all prior agreements and understandings of the parties with respect to the transactions contemplated hereby," and that "the parties shall look only to this Joint Coal Supply Agreement for the rights and obligations of the parties with respect to each other related to the subject matter hereof." JCSA § 12.12. According to the Government, this clause precludes the possibility that the proper application of the coal quantity discount is contained in the PSA.

Finally, the Government argues that even if the PSA and the JCSA properly were interpreted together, their plain language limits the discount to the coal burned in AVS II. The PSA defines the coal quantity discount according to "Section 5.6 of the [JCSA]." PSA, Art. I. The parties agree that paragraph 5.6(a) (i) of the JCSA applies,

which by its terms confines the discount to coal "consumed by Unit 2." JCSA ¶ 5.6(a) (i). In contrast, paragraph 5.6(a) (ii), which does not apply in this case,[31] defines the discount in terms of coal "consumed by Unit 1 or Unit 2." JCSA ¶ 5.6(a) (ii). The Government reasons that because (a) (i) was invoked during the performance of the contract, the discount in fact was limited to the amount of coal burned in AVS II.

Basin responds that the coal quantity discount is better described as a downward price adjustment that reflects the lower grade coal it purchased for the AVS facility. Since AVS I and AVS II equally shared the burden of burning the lower grade coal, both units properly shared in the discount. In support of this argument, Basin contends that its physical management, inventory and accounting system, and contractual arrangement for purchasing the coal all show that the discount, or the reduced price, properly was applied to the entire AVS facility.

Basin first explains that it applied the discount according to the physical allocation of the coal fines purchased from ANG. For purposes of its contract with ANG, Basin could, and did, calculate the amount of coal burned in AVS II, which then was used as the basis for the discount on its total monthly coal purchase. In reality, however, Basin maintained only "one big coal pile" to supply all of its plants, which was never in fact segregated into separate fuel supplies for AVS I and AVS II.

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[31] Paragraph 5.6(a) (ii) was only triggered by the meeting of a contingency, which was specified in paragraph 4.3(a) (ii) of the JCSA, but did not occur.

Second, for its own accounting and inventory purposes, Basin used the weighted average cost methodology, which is the industry standard for treating coal inventory. An expert for Basin testified at trial that it would be inconsistent with the weighted average cost system to apply the coal quantity discount to AVS II but not to AVS I. If the discount were to be allocated only to AVS II, customers who purchased power from AVS I would pay a higher rate than customers who purchased power from AVS II. Basin reasons that such a result would be unreasonable because both AVS I and AVS II burned the lower grade coal.

Finally, Basin contends that the JCSA and the PSA are integrated agreements that must be read *in pari materia* to reach the correct construction and application of the coal quantity discount. Basin interprets these agreements together to mean that the discount was to be measured on the tonnage burned in AVS II, but apportioned between both units.

The district court held that there was no breach of contract with respect to the manner in which Basin applied the coal quantity. We agree.

2. Analysis

It is true, as the Government points out, that cost-based contractors are prohibited from charging more than what is "reasonable and proper" and must limit the costs they pass through to those that are "actually paid." *See Jensen v. Manthe*, 95 N.W.2d 699, 703 (Neb. 1959). This means that the contractor must credit the buyer with

discounts and credits unless the contract provides otherwise. *See LaPuzza v. Prom Town House Motor Inn, Inc.*, 217 N.W.2d 472, 477 (Neb. 1974). However, in this case we are not asked to decide whether Basin did or did not credit WAPA with the discount it received from ANG. Rather, the question before us is whether the manner in which it apportioned that discount was proper. For the answer, we look to the terms of the contract itself.

The Basin-WAPA contract provides that at the end of each month Basin shall determine its "fixed" and "variable or energy related costs associated with the appropriate unit." Basin-WAPA contract at Ex. A, ¶ 3, 4. Coal is listed as a variable or energy related cost under the contract. Thus, we must determine whether Basin properly calculated its cost of coal for AVS II. As evidenced by the parties' arguments, Basin's cost of coal is not a black and white term in this case. When two good arguments can be made for either of two contrary positions as to the meaning of a contract provision, an ambiguity exists. *See Home Ins. Co. v. Aetna Ins. Co.*, 236 F.3d 927, 929 (8th Cir. 2001). Whether a contract is ambiguous is a question of law subject to de novo review. *See Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1040 (8th Cir. 2000). When a contract is ambiguous, the court looks to extrinsic evidence, such as the nature and the subject matter of the contract and the facts and circumstances surrounding its negotiation, to discern how the parties intended to define the contract terms. *See AgGrow Oils, L.L.C. v. National Union Fire Ins. Co. of Pittsburgh, PA*, ___ F.3d ___, No. 99-4319, 2001 WL 219144, at *2 (8th Cir. Mar. 7, 2001).

Basin entered into its contract with WAPA two years after it executed the JCSA and PSA with ANG. Based on this chronology, when Basin contracted to sell power to WAPA, its understanding of the cost to produce power was based, in part, on its contractual arrangement to purchase coal from ANG. Therefore, we look to the JCSA, which contains the coal quantity discount, as extrinsic evidence to ascertain the meaning of Basin's cost of coal for AVS II.

Basin and ANG executed the JCSA and the PSA on the same day. Although the JCSA deals with coal and the PSA deals with power, the context in which they were negotiated reveals that these contracts were closely linked and were component parts of a larger transaction. When two instruments are executed at the same time, by the same parties, in the course of the same transaction, and cover the same subject matter, they will be construed together. *See Jorgensen v. Crow*, 466 N.W.2d 120, 123 (N.D. 1991). Further evidence of the connection between these contracts is found in the plain language of the PSA, which expressly cites paragraph 5.6 of the JCSA. *See Lakeland Realty Co. of Minn. v. Reese*, 46 N.W.2d 696, 700 (N.D. 1951) (noting that instruments may be construed together where they reference and supplement each other). The integration clause flagged by the Government does not prohibit our examination of the PSA to understand the meaning of the coal quantity discount as defined in the JCSA. It is well-established that a statement in a contract that it is integrated is not conclusive, but only a factor to be considered. *See Restatement (Second) of Contracts*, § 209 cmt. b (1981). The surrounding circumstances pointing to the interrelatedness of the

JSCA and the PSA override the possibility that Basin and ANG intended one to be read to the exclusion of the other.

Paragraph 5.6 of the JCSA provides that ANG is to credit Basin with a discount equal to approximately fifty-eight cents per ton of coal consumed by AVS II. *See* JCSA ¶ 5.6(a) (i). The PSA sets forth the proper application of the coal quantity discount: "For Unit 1 and Unit 2 of the Generating Plant only, Fuel and Fuel Related Costs shall also include the full benefit of the quantity discount on fines provided for in Section 5.6 of the Joint Coal Supply Agreement between the parties." PSA, Art. I. This means that when it contracted to sell power from AVS II to WAPA, Basin understood that its cost of coal for the entire AVS facility was reduced by the coal quantity discount.

Course of performance also is relevant to explaining ambiguous contract terms. *See Restatement (Second) of Contracts*, § 5 cmt. a. ANG did not separately bill Basin according to the coal burned in AVS I and AVS II. Rather, ANG calculated the total amount of coal it delivered to the AVS facility and subtracted from that the discount based on the coal burned in AVS II. ANG's billing method also comports with the industry standard weighted average cost system used by Basin to track the coal supply for the entire AVS facility. Thus, ANG's invoices to Basin offer further proof that although the coal quantity discount was measured by the amount of coal consumed in AVS II, it was in fact allocated to the coal purchased for the entire AVS facility.

With this background in mind, we find that when it entered into its contact with WAPA, Basin intended that its cost of coal for AVS II include a proportionate share of the coal quantity discount. Although the Government argues for a different result, there is no evidence in the record to show that the parties understood Basin's cost of coal would be calculated in a different manner. For these reasons, we affirm the district court's finding that Basin did not breach its contract with WAPA by virtue of the manner in which it credited WAPA with the coal quantity discount.

B. Freedom Mine

1. Background

The second part of the Government's cross-appeal on the coal pricing issue relates to Basin's alleged overcharges to WAPA based on the Freedom Mine amortization rate, which was a component of the price WAPA paid for power under the Basin-WAPA contract.

The Freedom Mine provided coal for the production of power from the AVS facility. Basin was contractually obligated to fund a portion of Freedom Mine development and future reclamation costs.[32] Basin's Freedom Mine related costs were twofold: it directly financed a portion of mine development and it also made interest-

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[32] Basin shared this obligation with ANG, which operated the nearby gasification plant. Basin's estimated obligation constituted approximately fifty-three percent of the Freedom Mine costs and ANG was to fund the difference of forty-seven percent.

free loans to the Coteau Properties Company ("Coteau"), which operated the mine. Basin estimated total expenditures and loans based on engineering reports that projected Coteau's estimated financial needs over a certain period of time.

Basin amortized its Freedom Mine development costs (direct expenditures and imputed interest on loans) and recovered those costs through a per ton charge levied on the coal burned at the AVS facility. This charge was factored into the price of power paid by AVS II participants, including WAPA.

Basin calculated its per-ton amortization rate using five factors: (a) the amortization period; (b) the coal tonnage; (c) Coteau's principal payments; (d) additional expenditures; and (e) the interest rate for imputing interest. A Basin bookkeeper plugged the information into a spreadsheet and adjusted the rate until it "zeroed out" at the end of the amortization period. The result would serve as the amortization rate for the year. Basin recalculated the amortization rate at the beginning of each year, annually adjusting each factor in the equation according to the "best available information" at the time.[33]

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[33] On at least three occasions Basin recalculated its amortization rate mid-year when it received more accurate data. In March 1986, Basin reduced the rate from $2.2465 per ton to $1.9467 per ton, and made the change in its fuel register retroactive to January 1986. In March 1988, Basin again reduced the rate from $.7942 per ton to $.7650 per ton, and made the adjustment effective as of January 1988. Then in June 1990, Basin increased the rate from $.8233 to $.8945 and made the change retroactive to January 1990.

The Government does not complain about Basin's formula for calculating the amortization rate. Rather, the Government claims that Basin made fundamental errors in the 1986 and 1987 spreadsheets with regard to the variables representing the amortization period and additional expenditures.

The district court found that the spreadsheets computing the Freedom Mine amortization rate for 1986 and 1987 "[did not] add up" and included costs for advances from Basin to Coteau, "which were in fact never made." *Basin*, No. 90-345, slip op. at 14. The result, according to the district court, is that when the numbers are viewed in retrospect, they "appear to have little relationship with reality." *Id.* at 15. Although the court determined that the errors were caused by inaccurate estimates and faulty assumptions, it found that such errors did not require Basin to make retroactive adjustments. Under applicable accounting standards, estimated advances need not be retroactively corrected as long as such estimates were made in accord with the best available information at the time and modified in subsequent years to reflect any changes based on new information. Ultimately, the court concluded that the Government did not carry its burden of proving that Basin overcharged WAPA via the Freedom Mine deferral.

2. Analysis

The elements of a prima facie case for breach of contract are (1) the existence of a contract; (2) breach of the contract; and (3) damages which flow from the breach. *See Moorhead Const. Co. v. City of Grand Forks*, 508

F.2d 1008, 1015 n. 10 (8th Cir. 1975). The plaintiff bears the burden of proving each element.

The price WAPA paid for power under the Basin-WAPA contract was based on the cost of production. The cost calculation methodology set forth in the contract was based on the fixed and variable or energy related cost of producing power. Accordingly, to prevail in its breach of contract claim against Basin, the Government must show first, that WAPA's share of the Freedom Mine amortization rate did not represent a true cost of producing the power it purchased and second, that the miscalculated rate resulted in an overcharge to WAPA.

a. Amortization Period

Basin's amortization spreadsheet originally was structured for a thirty-two year amortization period to correspond to the term of its contractual obligation to finance the Freedom Mine. The Government complains that the 1986 amortization schedule for the Freedom Mine was only completed through the first nineteen years, which increased the annual amortization rate from what it would have been if it were carried through for the entire thirty-two year term. By increasing the annual amortization rate in this way, the Government complains that WAPA was unfairly burdened with paying more of the rate than it would have if a thirty-two year schedule

were used.[34] The district court did not make any specific findings on this issue.

Although the Government complains that Basin's switch from thirty-two to nineteen years unfairly shifted the financial burden of the Freedom Mine deferral to WAPA, it does not explain how that change amounts to a breach of contract by Basin. The Government also fails to explain how this switch constituted a material calculation error that Basin was required to retroactively adjust under GAAP.

We find no breach of contract with regard to Basin's change of the amortization period. The record shows that Basin had a legitimate reason for changing the amortization period. In 1988, ANG failed and was being operated by the Department of Energy, which wanted to sell it. In 1988, Basin acquired the assets of ANG from the Government. The acquisition plan called for Basin to form a subsidiary, Dakota Coal Company, which would acquire the assets and liabilities of ANG, as well as Basin's obligations to finance the Freedom Mine. As a result, on November 19, 1988, the obligation to advance funds to Coteau was transferred from Basin and ANG to the Dakota Coal Company.

Basin made its final loan to Coteau in 1988, which Coteau was to repay through March 2003. Basin then revised its amortization schedule so that the Freedom

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[34] The 1987 spreadsheet was calculated over a thirty-three year amortization period, although subsequent spreadsheets used a nineteen year period.

Mine amortization period would correspond with expiration of its last loan to Coteau.

Since the majority of the Freedom Mine amortization rate was based on imputed interest on Coteau's final note to Basin, we agree with Basin that it was reasonable to link the amortization period to the date when the final payment on that note was due. In any event, the Government has failed to prove any breach of contract with regard to the change in the amortization term.

b. Additional Expenditures

The Government's allegations that Basin erred with regard to the additional expenditures column of the Freedom Mine amortization spreadsheet are two-fold [35] First,

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[35] At trial, Deisz acknowledged the lack of information about what comprised the "additional expenditures" column:

> What I don't know and was not able to find out was for the column of additional expenditures it says expenditures. It doesn't say additional advances on the note. It says additional expenditures. If, in fact, those expenditures were not all advances, future advances on the note, but, in fact, expenditures that Basin Electric was going to incur and collect through the amortization of the rate, there's no error. It's right. I don't know if the additional expenditures are all advances or if, in fact, they include other expenditures.
>
> . . .
>
> Nobody who was around could recall how that additional expenditure played into the deferral and how it was supposed to be part of new advances or part of additional expenditures or what it was a part

the Government claims that the amortization spreadsheets projected more money going *to* Coteau in loans than was to be received *from* Coteau in repayments. Although the loans to Coteau were interest free, with imputed interest to be paid by AVS participants, Coteau was responsible for repaying the principal. Second, the Government claims that Basin imputed interest on additional advances that were not in fact made.

In 1986 Coteau's outstanding note balance was $41,712,484. Basin's amortization spreadsheet for that same year forecast additional expenditures in the amount of $12,629,190. If the additional expenditures figure represents an interest-free loan, rather than a direct expenditure by Basin, Coteau's total projected indebtedness to Basin as of 1986 was $54,341,674. However, the Coteau note *payments* calculated on the 1986 spreadsheet only amounted to $45,779,178, leaving a discrepancy of $8,562,496. According to the Government, Basin made up the difference between Coteau's note principal and repayments by increasing the amortization rate. The Government concludes that WAPA's share of the 1986 amortization rate wrongly included note principal.

A similar discrepancy is evidenced on Basin's 1987 spreadsheet. In that year, Coteau's note balance was $41,408,362 and the projected additional expenditures totaled $81,045,715. Again, assuming the additional expenditures column represents loans that were to be

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of it. There wasn't anybody around anymore that had done that back in those years.

(Trial Tr. of Shawn Deisz at 71, 172).

repaid, Coteau's total projected indebtedness to Basin as of 1987 amounted to $122,454,077. Coteau's projected payments on the same spreadsheet only totaled $64,687,180, leaving a discrepancy of $57,766,897. According to the Government, this $58 million also was amortized through the per-ton rate, rather than calculated into Coteau's payments, resulting in an overcharge to WAPA in 1987.

Basin responds that the Government cannot bear its burden of proving breach on this theory because of the unavailability of complete source documentation relating to the Freedom Mine amortization calculations, which were made more than a decade before this issue was brought to trial. The only available witness was the bookkeeper who simply plugged the numbers into the spreadsheet. No other witnesses who were involved in the development of the amortization formula or the numbers that went into it were available to testify. Moreover, many of Basin's records for 1986 and 1987 have either been lost or destroyed in the course of business. However, based on the information that is currently available about those years, a Basin executive explained that there were in fact plausible explanations for the figures that were used to calculate the amortization rate. Basin concludes that the Government's bold assertion of breach cannot stand on the piecemeal evidence it presented at trial.

The Government's second charge of breach regarding additional expenditures is that the amortization spreadsheets for 1986 and 1987 included advances to Coteau that were in fact never made. According to the Government, these so-called "phantom advances" increased the amortization rate and in turn, increased the price Basin

charged WAPA for power. Despite accounting principles that generally require prospective, not retroactive, adjustments to balance sheets, the Government maintains that Basin contractually was obligated to credit WAPA for the overcharge once it realized that the projected advances were not in fact made to Coteau.

In support of its argument, the Government points to the terms of the Basin-WAPA contract. Although the contract stated that Basin would "submit an estimated monthly bill to the United States within fifteen (15) days after the end of the month," it also provided that "[m]onthly adjustments [would] be made to correct for differences between estimated and actual bills." WAPA-Basin contract at ¶ 9(i). The Government argues that this provision in the contract supersedes any accounting principle that might otherwise suggest retroactive adjustments are not required. However, the Government points out that in this case GAAP actually required Basin to credit WAPA for the overcharge. Under GAAP, material errors such as the one promulgated by the phantom advances must be made on a retroactive basis. Thus, the Government concludes that Basin breached the contract by virtue of the phantom advances whether the issue is analyzed under the strict terms of the contract or under GAAP.

Basin responds that its amortization schedules necessarily and permissibly were based on Coteau's estimated and projected needs for the Freedom Mine. To support its argument that the methodology for estimating and updating the annual Freedom Mine amortization rate comported with GAAP, Basin points to the conclusion of the outside audit performed by Coopers. After reviewing

Basin's amortization methodologies, data and calculations, Coopers concluded that Basin's procedures with respect to the Freedom Mine amortization rate were both "reasonable and proper." Basin also explains that the experts who testified at trial all agreed that it was proper for Basin to base estimated additional expenditures to Coteau on the "best available information" at the time the estimates were made and that GAAP requires prospective adjustments to be made as the "best available information" changes.[36] Under GAAP, retroactive adjustments are reserved only for material error. Thus, under-estimates or over-estimates in an amortization calculation only should be changed prospectively when annual adjustments to the rate are made.

The district court was correct that the spreadsheets for 1986 and 1987 do not add up in the sense that they reflect more going to Coteau than collected from Coteau over the course of the amortization period.[37] Basin does

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[36] However, the Government's experts testified that the skewed numbers produced by the spreadsheets should have raised a red flag to Basin and that Basin should have acted to correct the errors. For instance, Ned Christiansen, an accountant with KPMG, testified on cross-examination that "[t]he 1986 advance of twelve million dollars wasn't really hindsight for them. When they were preparing 1987, they would have known that twelve million dollars hadn't been advanced, and that should have triggered somebody to . . . evaluate these advances." (Trial Tr. of Ned Christiansen at 118). Christiansen went on to explain that as time went on Basin did a better job of analyzing the future and preparing the amortization schedule.

[37] The Government points out that despite confusion in the evidence as to whether the additional expenditures constituted direct expenditures by Basin (which Coteau was not obligated

not attempt to justify the discrepancy under any accounting or legal principle. Rather, it focuses on how the additional expenditures column in the spreadsheets necessarily was based on estimates and calculated using the best available information at the time.

However, this reasoning does not explain why the spreadsheets forecasted more being paid to Coteau than collected from it over the life of the amortization period. The Freedom Mine amortization rate was to include Basin's direct expenditures on the mine and imputed interest on advances to Coteau. Principal on advances was not a legitimate component of the rate. Despite the admittedly sparse evidence the Government set forth at trial to support its claim, when weighed against Basin's response that there are "plausible explanations" for the Freedom Mine figures, the claim deserves attention.

According to the calculations and spreadsheets introduced at trial, the rate included principal. Moreover, under GAAP these erroneous calculations constitute a material error that must be retroactively corrected. Our

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to repay) or additional advances (upon which Coteau was obligated to repay principal, but not interest), the district court made a finding of fact that the money reflected on the spreadsheets were *advances*. *See Basin*, No. A1-95-003, slip op. at 14-15. The only evidence to the contrary that Basin presented at trial was speculation by a Basin executive who asserted that there were "plausible" explanations for the numbers. Basin does not seek to clarify the issue on appeal and refers to the additional expenditures column as "advances" in its briefs. For this reason, we find that the additional expenditures column constituted additional advances on the loan, with principal to be repaid by Coteau and imputed interest to be recovered through AVS participants.

concern is not with the accounting resolution of Basin's books, however. Our focus is whether the errors warranted a refund to WAPA. Basin acknowledges that it did not retroactively adjust the Freedom Mine amortization rate for preceding years, or credit WAPA for the overcharge on a prospective basis. Thus, insofar as the amortization rate included principal on advances to Coteau, Basin breached the contract.

Upon review of the record it is also clear that Basin included advances in the 1986 and 1987 spreadsheet that were not in fact made. It is true that under GAAP, as long as Basin's projected additional expenditures on the Freedom Mine were based on the best available information at the time, it was not required to make retroactive adjustments. It is also true that Coopers audited Basin's financial statements with regard to the Freedom Mine amortization rate and found that Basin's methodology was "reasonable and proper." But the question of whether Basin overcharged WAPA under the contract is not solved by accounting principles. Rather, the terms of the contract govern what was and was not an appropriate component of the cost WAPA paid for power.[38]

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[38] We find the Government's argument based on paragraph 9(i) of the Basin-WAPA contract to be unpersuasive. Although the provision states that Basin would submit to WAPA an estimated monthly bill, which thereafter would be adjusted to reflect the actual bill, Basin argues that the intent and purpose of this provision was to adjust WAPA's bills according to WAPA's actual consumption of power, not Basin's actual cost of producing that power. This is a reasonable interpretation if it is true that WAPA's power consumption readily was determinable on a monthly basis, while the actual cost of producing that power was not. For instance, the Freedom Mine deferral rate,

Accordingly, we find that Basin also breached the contract with respect to the advances in the 1986 and 1987 spreadsheets which were not in fact made.

This finding of breach, however, does not necessarily mean that the Government will be successful on its Freedom Mine claim, as its claim is inextricably intertwined with it proving any damages it suffered as a result of the breach. Accordingly, we reverse and remand this claim to the district court for a determination of damages, if any.

PART VI. CONCLUSION

In conclusion, the resolution of this case on appeal is as follows. First, on the issue of the sale/leaseback of AVS II appealed by Basin, we find that the district court erred in determining that Basin overcharged WAPA more than the $2.4 million it refunded prior to this litigation. We also find that the district court erred in determining that Basin submitted the $2.4 million in overcharges with the intent necessary for a False Claims Act violation. We therefore reverse the district court's judgment for Norbeck under the False Claims Act. Second, on Basin's appeal of the 10/20 amortization issue, we find that the district court erred when it found that Basin breached its contract with WAPA by choosing a ten-year amortization period. In view of our holding that Basin did not breach

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which factored into Basin's cost of producing WAPA's power, was calculated on an annual basis, which would have rendered the contract's monthly adjustment provision meaningless in terms of that variable. For this reason, the contract provision relied on by the Government does not support its argument.

its contract with WAPA by choosing a ten year amortization period, Norbeck's claim of fraud on this issue, which the district court dismissed, is no longer a viable claim and is ordered dismissed. Third, on the issue of imputed interest cross-appealed by Norbeck, we affirm the district court's dismissal of this claim. Finally, on the Government's cross-appeal of the coal pricing issue, we affirm in part, and reverse and remand in part. We affirm the district court's finding that Basin did not breach its contract with WAPA by virtue of the manner in which it apportioned the coal quantity discount. However, we reverse the district court's finding with regard to the Freedom Mine amortization rate. Therefore, we reverse and remand the Freedom Mine issue to the district court for a determination of damages, if any. On Norbeck's False Claims Act claims that are reversed and the Government's claim involving the coal quantity discount, we remand to the district court with directions that these claims be dismissed with prejudice.

BEAM, Circuit Judge, concurring.

I concur in the result only.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

UNITED STATES OF AMERICA, ex rel
Robert J. Norbeck,

Plaintiff,

-v- Case No. A1-95-003

BASIN ELECTRIC POWER COOPERATIVE,

Defendant.

MEMORANDUM AND ORDER

FACTUAL BACKGROUND

North Dakota has large deposits of lignite coal, and central areas of the State have become a center for coal fired power generating plants and the site of the construction of a plant designed to convert lignite coal into a usable gas, the coal gasification plant. The gasification plant required supplies of coal, water and electrical power.

Basin Electric Power Cooperative was organized to build power plants and supply power to its member distribution cooperatives after the Bureau of Reclamation advised its then customers, cooperatives and municipal utility systems, of its inability to grow to meet future demands. Basin Electric built a number of plants, one complex of which is involved in this action. The Antelope Valley Station, Units I and II, was built in close proximity to the gasification plant, to lignite mining areas and to water supplies from the Missouri River. (See Ex. No. 581 on page 2) The gasification plant was to be a major user

of its power generation and would share certain facilities with the Antelope Valley Station.

Each of these components, whether an equipped strip mining operation, a coal fired steam power generating plant or the gasification plant itself involved major expenditures and long lead times between conception and completion of construction. The permitting process alone, whether for water rights, transmission line corridors, mining permits or approval of reclamation plans was complex

(Ex. No. 581 Omitted In Printing)

Western Area Power Administration (WAPA), formed from the original supply arm of the Bureau of Reclamation, is a unit of the Department of Energy which generates and distributes power to regional or local distribution utilities. One of its sources of power is the Garrison Dam hydroelectric generating plant in the general area of the other facilities involved in this action.

A series of influences and events caused Basin Electric and WAPA to negotiate a contract whereby Basin Electric would sell WAPA 185 MWH of the capacity of its Antelope Valley Station (AVS) Unit II plant, with delivery to commence when the plant was completed some years later. Both the Sacramento and Billings regions served by WAPA were facing increased power consumption needs, and, while sources were available in the California market, the cost was high and predicted to increase. Basin Electric had designed and built the Antelope Valley Station to meet its projected power needs for its member cooperatives. In 1982, when the agreement was negotiated with WAPA, it had become clear that the demand

estimates were high (a problem then being faced by many others in the industry) and that the entire capacity of AVS Unit II would not be required to serve Basin Electric's customer needs. The WAPA contract ended on November 1, 1990, and had an approximate 5 year life.

The WAPA contract with Basin Electric was a "cost of production" priced contract rather than one which set a fixed mill rate per unit of power sold. WAPA benefited from a final rate which, even with the transmission expense and losses, let it charge its customers a lower price than it would have had to charge if other generating sources had been used. Basin Electric benefited in that the agreement returned to it the costs involved in the then extra capacity of the AVS Unit II plant, allowing it to avoid having to pass on to its member cooperative customers the continuing amortized costs of the excess capacity.

Mind boggling complexities now begin to develop. A part of the justification for the coal gasification plant was the belief that with the deregulation of the production and pricing of natural gas as well as other world factors, the price would escalate sharply. Using this conventional wisdom, the four partners in the gasification plant construction sought to guarantee a supply of fuel for their residential customers through the use of the plant. They all signed contracts to purchase the plant output at prices higher than the then market price of natural gas, but a rate which they felt the market would soon reach after deregulation. Many other utility suppliers of natural gas entered into "take or pay" capacity contracts with producers and well owners in order to guarantee a supply. Unfortunately, or perhaps fortunately, depending on

one's position in the food chain, natural gas prices dropped sharply after deregulation rather than the expected increase.

The Department of Energy had financed the construction of the gasification plant which cost in excess of a billion dollars. The mortgage went into default and the government foreclosed. The government eventually obtained title to the plant and then sold the plant to Basin Electric. At the conclusion of this transaction, Basin Electric owned the AVS generating complex and also owned the major customer of that power, the coal gasification plant. The initial four partners were held to the performance of their agreements to purchase the output of the plant. As an interesting aside, the plant turned out to be more efficient than initially thought and produced great quantities of now high priced gas currently being consumed in Detroit and Cleveland. In ways not yet fully clear to me, Basin Electric also acquired some ownership position in either the coal or the Freedom Mine itself through the purchase of the gasification plant and a related transaction prepaying royalties on certain coal.

One of the conditions which the government put into the sales agreement of the gasification plant to Basin Electric was a requirement that Basin Electric guarantee needed coal supply and, in connection with that, fund mine development costs and future reclamation costs of the Freedom Mine which was to be the principal supplier of coal to the gasification plant. In a somewhat unusual arrangement, the coal burned in the AVS came to it through the gasification plant. The gasification plant purchased the coal from the Freedom Mine, screened it to the appropriate sized lumps, fed these lumps into its process

and then delivered the screenings – the "fines" – to the power plant complex. Some 90 to 95 percent of the fuel used by the power plant complex is this "fines" coal.

A new player was then added to the mix. Basin Electric caused a corporation named Dakota Coal Company to be formed. Dakota Coal was placed between the Freedom Mine and the gasification plant in the process of coal supply to the gasification plant, owned by Basin Electric, and through the plant to the AVS generating plant, also owned by Basin Electric. Adding to the potential confusion is the fact that Basin Electric "sold" the AVS Unit II and then leased it back, which had the result of substituting lease "cost" instead of amortization "cost" in the computation of power costs to WAPA.

The Board of Directors of Basin Electric consists of members elected from each of its distribution regions, and are characterized by Basin Electric as "farmers and ranchers." The Board of Directors of the gasification plant has a majority of its members drawn from the Basin Electric Board. The Directors of Dakota Coal are all members of the Basin Electric Board or management officials of Basin Electric. Robert McPhail serves as President and CEO of Dakota Coal, the gasification plant and of Basin Electric. Dakota Coal has no employees. Basin Electric guarantees repayment of any loans made to Dakota Coal according to one witness, and refined by another to be an arrangement whereby Basin Electric would continue average payments for coal for one year even if no coal was produced and delivered. The Court is left with the impression that Basin Electric personnel also very effectively control the operation of the Freedom Mine through

the requirement for mine development and reclamation guarantees.

Robert McPhail was the administrator of WAPA at the time the agreement with Basin Electric was negotiated. He was hired by Basin Electric in 1985, and charged with responsibility to reduce the operating overhead of Basin and improve its revenue, thus stemming, at least in part, the continuing escalation of costs of power to its member cooperatives. The Court notes his apparent success. Some of the decisions made and methods used by Basin Electric personnel to accomplish revenue enhancement for Basin Electric form the basis for this dispute.

ANALYSIS

This action involves claims that Basin Electric overcharged WAPA for the power delivered to it under the 1982 185 MWH contract.(Ex. Nos. 195-97) Central to all claims is the interpretation of the contract as a "cost" contract and then the methodology of determining what actually are the chargeable costs. The courtroom, for the most part, contained 6 lawyers and 6 CPA experts, no two of whom agreed completely on anything.

The claims are on several levels. The government does not seek to prove fraud, instead alleging mistake or "honest" misinterpretation of the contract obligations. Mr. Norbeck, the initial instigator of this Qui Tam action, seeks to prove the elements of "false claims" as defined by statute and thus treble claimed damages and participate in any judgment award. 31 U.S.C. §§ 3729-3733.

The specific claims and issues are:

1. Appropriate handling of the amortization of the "common facilities". The AVS consists of two generating plants and an area designed to provide services to both Units I and II. Unit I was put into service first, and in connection with this, the entire "common area" was activated. The cost portion of the common area designed to service AVS Unit II was deferred in two stages. The first stage was a deferral until AVS Unit II came on line, and then a 10 year amortization thereafter. The effect of this deferral was to remove this portion of the cost from the rate base used to bill customers buying power generated by AVS Unit I. The very valid argument and rationale which a regulator would use would be to point out that these costs were not necessary for the operation of AVS Unit I and therefore should not be an economic burden to those customers of power from AVS Unit I.

The question presented by this issue is the question "was Basin Electric's assignment of a ten year amortization period proper during the period covered by the WAPA contract and extension to a 20 year period immediately after the end of the WAPA contract?" The government claims an overcharge of approximately $3.6 million, resulting from the increased annual cost to WAPA through the use of a 10 year rather than a 20 year period.

There is no dispute that the use of a 10 year period instead of a 20 year period resulted in an increase of power cost to WAPA and to Montana Dakota Utilities Company, purchasers of the "excess capacity" power of AVS Unit II. There is also no dispute that as a result of the 10 year period, the later customers using power from AVS

Unit II were charged less as a lesser amount of amortized cost remained. Even this relatively straight forward premise is complicated however by the fact that during the five year term of the WAPA contract Basin Electric prepaid several of the installments which would have come due in 1991, after the end of the WAPA contract, which makes a "before and after" comparison difficult to illustrate.

This issue took a majority of the trial time, or at least seemed to do so. Public utilities generally are regulated as they usually have a monopoly status. Regulation governs rates paid by the consumers. Regulating boards are generally elected officials. Consumers are the majority of the people entitled to vote. Political pressure exists to at least have rates charged to consumers be "stable" – to not show sharp increases month to month or year to year. The Court suspects that stability of charges is of far greater political concern than the actual charge itself.

Generating and Transmission businesses (G & Ts) are forced to make huge investments in plants and facilities. Some of the investment can be spread over the useful life of the plant and amortized into the rate base in relatively small increments, contributing to stability of rates. Other expenses may not properly be spread in this fashion, even though not of a recurring nature, and great political pressure exists to extend amortization periods as long as possible and extend deferral of other non-recurring costs as long as possible.

During the 1970s a number of G & Ts over built capacity. A concern was raised that the expenditures

could not reasonably be recovered in total from customers. FAS 71 establishes this "reasonable expectation of recovery" as the Generally Accepted Accounting Principle (GAAP) to govern auditors in preparing opinions on the accuracy of the financial statements of the businesses being audited. (Ex. No. 84) If an auditor determines that more amortized and deferred costs are projected into the future than can reasonably be expected to be paid, that auditor would be forced to issue a "qualified" opinion, which could have serious consequences to the business being audited. The GAAP and Generally Accepted Auditing Standards (GAAS) are pronouncements of the Financial Accounting Standards Board (FASB) – the board of Gurus governing the public accounting profession.

As a result of growing concern that too much money was being deferred or amortized too far into the future, the FASB sought to amend FAS 71 through the adoption of FAS 92, (Ex. No. 76) which sought to limit new deferrals, or "phase in plans", to a maximum period of 10 years. This was not a popular move with both politically sensitive regulators and the utilities themselves as it would force higher charges over a shorter period, thus having a destabilizing effect.

When FAS 92 was finally adopted it contained a definition of "phase in plan" which did not require the use of the ten year period for the common area deferral of AVS Unit II, and the deferral plan ultimately submitted to the Rural Utility Service (RUS) provided for a 20 year deferral period, a change which took place shortly after the end of the WAPA contract.

Basin Electric's position on this issue is that many of its management people fought against the use of the 10 year period but lost out to the dreaded CPA types who insisted that FAS 92 would ultimately apply and require the 10 year period, and in fact might require a shorter period relating back to the date when the common facility was activated to serve AVS Unit I. The then employees of Coopers and Lybrand, the outside accounting firm doing the financial statement audits for Basin Electric, now with other firms or employment, confirm that this potential problem was discussed with the accounting and auditing staff of Basin Electric. Again, they were unable to produce any writing documenting this advice or concern. The Court accepts that these discussions took place with Mr. Sukut or Mr. Norbeck, but also notes that no witness or testimony carries these discussions or fears into the Manager's office or into the Board Room of the Cooperative.

Once again, complications abound. Memos written during the period of supposed controversy by the various people who supposedly "won" the argument for the 10 year period, indicate a belief that "phase in plan" definition did not in fact cover the costs involved in this claim, and express possible options of "longer periods if desired". (Ex. No. 75) Coopers and Lybrand's services were terminated about the time the WAPA contract ended. The Court has the distinct impression that they were not particularly interested in producing any documentation on this issue and in fact claimed that any record which might have been created had been destroyed in the regular course of business. Basin Electric

had to pay to get any audit work sheets still extant relating to other issues raised by plaintiffs.

Plaintiffs respond by pointing out that not a single writing has been found or produced to substantiate this claim, and further that Basin Electric cannot, or has not, shown who made the decision to present a rate plan to the Basin Electric Board of Directors containing the 10 year amortization period.

I have great respect for a number of the professionals on the staff of Basin Electric. Mr. Howard Easton is a very knowledgeable expert in the complex business of marketing and distributing power to the various customers of Basin Electric. Ms. Deisz, as a CPA, is competent, articulate and loyal.

Two undisputed facts should be discussed here. The first of these is that WAPA received its power at a substantially lower cost (even with any claimed overcharges) than the contract negotiators assumed might be the case when meeting in 1982. Representatives of Basin Electric appear to be hurt that this fine result is met with a claim for overcharge. Two other claims arise for the sale and lease back of AVS Unit II. Once again, this transaction probably resulted in a lower cost to WAPA even with the alleged overcharges in connection with it. I sense that the general reaction of the Basin Electric people is that this is once again proof of the adage "no good deed goes unpunished." WAPA may have gotten a "good deal" overall, but the issues are whether or not the deal should have been even better under the contract.

Plaintiff's position is:

a. Accounting standards also require that similar transactions be treated in similar ways. The Laramie River Common Area deferral was assigned a 20 year amortization period.

b. WAPA was entitled to expect that the common area deferral and amortization would be treated as was the Laramie River deferral. (Had anyone at the agency even bothered to think about it?)

c. The effect of the 10 year amortization period was to load the "cost" factor in the 185 MWH contract with large payments during the term of the excess power contracts, and thus benefit the member cooperative customers (who elect the Board of Directors), who, not coincidentally, extended the 10 year period to a 20 year period immediately after the expiration of the WAPA contract.

d. The claimed struggle between the auditors and the marketers probably did not occur and the references to the circulated draft of proposed FAS 92 and its probable dire consequences never reached the board of directors, who allegedly approved some rate making plan, at some time, which incorporated the 10 year period.

e. The only formal "plan" ever submitted to RUS and approved by it was for the 20 year period, acknowledging that the requirement for the submission of a "plan" at all did not appear until late in the contract duration period. (Ex. Nos. 120, 135)

I find the requirement for consistency and uniformity to be controlling. The circumstances demonstrate that the

treatment of the common area deferral with a 10 year amortization period and its change to a 20 year period immediately after the expiration of the WAPA contract to have resulted in an overcharge to WAPA under the 185 MWH contract. The nature of that overcharge will be discussed later.

2. Accounting for lease payment intervals. WAPA was billed and paid on a monthly basis. The monthly bills, after the sale of AVS Unit II were primarily based on the amount of the lease payments. The anticipated annual costs were divided by 12, and billed monthly. Basin Electric made its lease payments on a semi-annual basis. The illustration was that a $24 million payment is due in June and a $16 million payment in December, both with interest computed at some variable rate formula. The actual interest paid was used as an adjustment in later payments, but was of a relatively small effect. Is it proper for Basin Electric to profit by the use of the WAPA payments before its payment obligation became due and was paid? The government claims an overcharge in the vicinity of $1 million.

Basin Electric points to the accrual accounting system which required monthly posting of the accrued lease obligations, and also points to the testimony of WAPA personnel who wanted the monthly billings as uniform as possible. (Remember the concept of rate stability mentioned earlier?) This issue arose first in the audit conducted by Montana Dakota Utilities Co. another surplus power contract purchaser, and led to the creation of a memo (Ex. No. 18) indicating that Basin Electric could, if required, bank the monthly lease payments until needed,

in an interest bearing account, and adjust back to MDU for the value of the money pre-paid in this fashion.

I find that indeed this could have been done. I further find that Basin Electric benefitted from the use of the pre-payments, but I also find that Basin Electric's treatment of this billing matter was reasonable and allowable. Not every advantage taken is an overcharge. The contract is silent on this issue and the modification to reflect the cost change to lease payments is also. The very concept of Qui Tam proceedings seems to pre-suppose incompetence on the part of the government employees responsible for seeing to it that charges are proper. While that presumption in some cases seems to have validity, in this situation it does not result in the Court implying a contract provision which was not included by the parties.

3. Accounting for the coal discount. The coal ultimately burned in the AVS moves first from the mine to the gasification plant. At the gasification plant the coal is screened, and the particles that are small enough to pass through the screening process are called "fines" and are then passed through to the AVS. The boilers used at the station are fueled by powdered coal which is blown into the combustion chambers. The "fines" sent over to the power plants have a lower BTU content than the larger coal sizes due to concentration of dirt and other non combustible material in the fines.

The agreements between the gasification plant and Basin Electric were entered into back when Basin Electric did not yet own everything in sight. The agreement in question provides that a discount will be given to Basin

Electric, below the "cost" of the coal delivered to the gasification plant, for all coal burned in AVS Unit II.

The government claims that the full benefit of the discount given for the use of fines was not properly passed through to WAPA. The government claims an overcharge in the vicinity of some $440,000.00, based on the undisputed fact that Basin Electric applied the discount to the "average weighted cost" of fuel in the common use coal pile, and thus AVS Unit I participated in the lower price, instead of all of the discount being applied to the cost of operation of AVS Unit II.

Once again, I do not find the method employed by Basin Electric to be unreasonable. WAPA would have benefitted from the approach now urged by the government auditors, but the advantage taken by Basin Electric was permissible, although further evidence that WAPA's final cost was such a good deal that no one looked into the composition of the billings.

4. The inclusion of and amortization of the Freedom Mine development account in the computation of cost of fuel to Basin Electric and eventually to WAPA. The government claims that Dakota Coal/Basin Electric overcharged for coal by including phantom advances into the formula used to compute coal costs. The advances were never made but the pricing never adjusted. The government claims an overcharge of approximately $850,000.00.

The issues surrounding the pricing of coal are almost beyond comprehension. I am unable to find my way though the morass created by the developments which led to Basin Electric ending up owning the gasification plant and the power station and the Dakota Coal Co. and

possibly the Freedom Mine or some of the coal in it. The testimony shows that a relatively low level employee of Basin Electric obtained data from a variety of sources within Basin Electric. She then put this data into a program which produced a spread sheet (Ex. Nos. 55-60) showing how much of amortized expense – in addition to the "cost" of the coal as delivered by Coteau, the operator of the Freedom Mine, would go into the final "price" of the coal to the gasification plant, and, through the gasification plant to the AVS. As with everything else, the figures are in the millions of dollars. The spread sheet doesn't add up and includes costs for advances to the mine operator to be made by either Basin Electric or Dakota Coal which were in fact never made.

Once again, the dreaded accounting and bookkeeping standards require that pricing methodology such as used here be based on estimates in accord with the best available information. If the estimates are wrong, the estimates used for next year will be modified to reflect the best available information then available. The changes go forward and not to the prior year, unless the discrepancy qualifies as a "mistake". The witnesses seem to agree that this practice could result in a significant price distinction between years. The government auditors are correct that the spread sheets for the two years in question appear to have little relationship with reality, using the wonderful clarity of hind sight. It also appears that some portion of the Basin Electric complex benefitted somewhat from this inclusion of "phantom advances", but I find that plaintiffs have not carried the burden of proof on this issue, which may be more a comment on the

ability of the fact finder than on the quality of the plaintiff's presentation. Once again, this is another small advantage taken by Basin Electric.

5. The effect of the insertion of Dakota Coal into the coal provision process. The government's claim, simply stated, is that WAPA was entitled to the "cost" of fuel. Dakota Coal added a profit margin to the Freedom Mine price to it, which is improper. The government claims this resulted in an overcharge of some $769,000.00. (Note – the financial statements of Dakota Coal do show a retained profit after all expenses for the period involved.) (Ex. Nos. 173-179)

Dakota Coal Company has no employees. Its directors are all board members or management personnel from Basin Electric. It is a wholly owned subsidiary of Basin Electric. Its personnel needs, on a full time basis, range from one and one half to two employees. It is not economical to have a separate pension plan, health insurance plan, etc. for only two employees, so Dakota Coal "contracts" with Basin Electric for the provision of employee services to it.

Several reasons were advanced for the organization of Dakota Coal. One is that Dakota Coal had financing needs that really were inappropriate for the Cooperative form of Basin Electric. The second is that certain obligations passed to Basin Electric when it purchased the gasification plant, including the obligation to guarantee the final environmental reclamation work when the Freedom Mine was eventually abandoned, and before that, to fund "mine development" so that there was a guarantee of coal availability.

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Defense witnesses indicated that earning a profit by Dakota Coal was reasonable and necessary so that Dakota Coal would have economic strength when seeking favorable financing rates. In years after the expiration of the WAPA contract Dakota Coal paid dividends over to Basin Electric. Defense witnesses further indicate that the great majority of "profit" reported by Dakota Coal in its annual statements came from the wonderful world of assets created by the Federal income tax laws and not from coal sales.

To the extent that Dakota Coal "stepped on" the costs of the coal in order to generate a profit, the court finds this to be an unacceptable overcharge. The claims of business independence or arms length bargaining between Dakota Coal and Basin Electric are ludicrous, yet the attribution of the profit reported to matters other than coal sales is completely relevant. The government claims damages of $769,000.00. I find $100,000 attributable to coal sales to be more appropriate.

6. Mr. Norbeck claims that Basin Electric used a portion of the sale proceeds of AVS Unit II to satisfy high interest debts which were not connected with the construction of AVS Unit II. (This is not questioned as good business judgment on the part of Basin Electric.) The result however is that power cost to WAPA was not properly adjusted as would have occurred if all proceeds were used to retire debt costs used in the computation of costs to WAPA. (Note: Basin Electric, prior to the filing of the action, acknowledged an overcharge in this area and paid a refund to WAPA of some $2.4 million.) Norbeck claims the proper refund is in the vicinity of $15 million.

There is little factual dispute on this issue. Basin Electric did apply some $99.5 million from the proceeds of the sale of AVS Unit II to debts not connected with it. An exhibit signed by Mr. Easton shows the decision to use this portion to retire higher interest bearing debt. (Ex. No. 347) From Basin Electric's standpoint, this was a good business decision. It is acknowledged that WAPA was in fact overcharged. The dispute comes with the method used by Basin Electric to compute the refund.

The total debt of construction of AVS Units I and II and the common areas built to serve both units, was treated by Basin Electric's accountants as a, to use my term, "glob." This was done even though the three entities, Unit I, Unit II and common area were treated differently in many areas, including the assignment of 50% of the common area to AVS Unit II for purposes of deferral and ultimately, the sale and lease back of AVS Unit II with its discrete price and debt computations.

When Mr. Norbeck indicated that Basin Electric faced reprisals for this misapplication of sale proceeds, Mr. Easton's staff prepared a computation which applied the $99.5 million to the total remaining debt "glob" attributable to the entire AVS, and then factored the resultant savings down to the percentage which had continued to be billed to WAPA as a part of the cost of power in addition to the lease payment obligation. (Ex. Nos. 347, 349-52, 354-58) The $2.4 million refunded to WAPA is the result of this computation. The computation of Mr. Norbeck's expert applies the entire $99.5 million to the remainder of debt attributable to the cost of AVS Unit II and 50% of the cost of the common area serving both units.

The Basin Electric computation was reviewed by an outside auditor, approved and both the computation and audit submitted to WAPA. The reaction of WAPA employees as evidenced by internal correspondence seems to vindicate the congressional intent in creating the Qui Tam suit framework. "What in the world is this?" – "I am not sure, but it is giving us a credit so it must be ok." I find of interest the fact that WAPA really did not want the cash – which it would have had to turn over to the Treasury – but preferred some hidden credit on power or transmission charges. Eventually, finding no acceptable way to circumvent Treasury Department regulations, the cash refund was accepted and turned over to the Treasury Department.

Professor Heitger's analysis is sound. "Cost" under the contract requires the application of the $99.5 million to the credit of the asset sold to generate it and to the computation of further interest cost charges made to WAPA in addition to the lease payment costs.

7. Norbeck claims Dakota Coal/Basin Electric failed to credit coal cost with the proper total of tax credits received through the Freedom Mine. While $1.7 million was properly credited, a smaller portion was not. This results in a claim for $119,800.00. Basin Electric's witnesses indicate that the credit was in fact given but was not set out as a separate line item as was done for the $1.7 million, so was not called to the attention of the government auditors. This testimony was not challenged and is accepted.

8. Norbeck claims that Basin Electric overstated the cost of power to WAPA by imputing interest to its non-borrowed investment in the AVS Unit II plant after the plant was placed "on line". This is claimed to have resulted in an overcharge of $4,253,917.66. Basin Electric appears to have three positions on this matter, all from the same witness. One was a statement that no imputation of interest continued after the plant was placed into production. The myriad of CPAs all opined that imputation of interest on equity capital during the period of construction was wonderful, resulting in a true "cost" computation for purposes of amortizing cost once the plant was placed into production. All appear to agree that, depending on one's terminology, the imputation of interest on equity capital should not continue after the date at which the amortization is set.

This "no imputation" position may be based on position two, which was to the effect that although the money was on hand at Basin Electric, it really was money "borrowed" from class A member cooperatives (the court assumes from unpaid patronage accounts due eventually back to the local co-op's customers) and therefore it was not really equity capital. As "borrowed money" interest expense was properly charged to WAPA under the standard system of accounts specified in the contract.

The third position is wonderful and somehow illustrative of the position taken by Basin Electric on most issues. Basin Electric undercharged WAPA for interest expense in that some interest income – as opposed to expense – was netted out of the expense item posted to the uniform account system. The RUS insists that all expenses be reported intact and that offsetting revenue be

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reported intact as revenue, not offset before posting of expense. That the contract just requires Basin Electric to charge those items which fall into the appropriate categories of the system, and WAPA is not entitled to any "cost" credit for offsetting revenue.

I am perhaps going beyond the record at this point, but the nature of a cooperative must be considered. A cooperative has members as opposed to stockholders. In theory, a cooperative does not generate a profit from operations, but does generate a surplus from its business operations which is "owned" by its members. That ownership is generally called an entitlement to patronage refund, and is eventually distributed back to members based on their relative business with the cooperative. A frequently used period of retention of surplus is 10 or more years.

Basin Electric is a G & T cooperative, with "member" cooperatives, which in turn have individual business members. Each individual member cooperative has retained patronage member funds. I assume that this is the source of Basin Electric's general fund "borrowed" money. The alternative is that it is comprised of patronage refunds eventually to go back to the member cooperatives based on their percentage of the business done by all member cooperatives.

In all events, while it is not borrowed in the sense that a mortgage document might exist, it is not strictly equity capital either. I do find however, that whatever Basin Electric may have done or not done with interest on General Fund investment in AVS Unit II after it came on line, is justified in view of its structure.

9. Norbeck claims that the combination of all of the factors found in the audit show that Basin Electric knowingly engaged in conduct meeting the standard of "fraud" as applicable to the False Claims Act. 31 U.S.C. § 3729. Under the False Claims Act knowing and knowingly are defined as follows:

> the terms "knowing" and "knowingly" mean that a person, with respect to information –
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
>
> (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.
>
> 31 U.S.C. § 3729(b)

Specific intent to defraud is not required to be proven and the submission of claims to the government in an extremely careless or foolish manner is sufficient to constitute a reckless disregard for the truth and as such, a finding of fraud under the False Claims Act. *United States v. Cooperative Grain and Supply Co.*, 476 F.2d 47, 60 (8th Cir.1973) (holding grain co-op and employees violated False Claims Act in collecting price support payments on grain that was ineligible). In *Cooperative Grain* the defendants applied for price support payments on purchased grain, rather than produced grain, without bothering to ascertain whether the grain was eligible. *Id.* at 51-54. The Court held the incorrect representations made by the defendants were extreme carelessness amounting to a "knowing" violation. *Id.* at 60.

The findings of the Court on the various claims are as follows:

1. Amortization period of common facilities – for plaintiff United States in the amount of $3,597,961, plus interest in the amount of $4,434,070, for a total of $8,032,031.

2. Lease payment intervals (time value of money), a claim of $1,040,239 plus interest of $287,507, for a total of $1,327,746, for defendant Basin Electric for dismissal of this claim.

3. Coal quantity discount, a claim of $439,295 plus interest of $660,530 for a total of $1,099,825, for defendant Basin Electric for dismissal of this claim.

4. Freedom Mine Deferral, a claim of $851,323 plus interest of $1,223,247 for a total of $2,074,570, for defendant Basin Electric for dismissal of this claim.

5. Dakota Coal Company unallowable costs (profit margin), a claim of $768,847 plus interest of $769,476, for a total claim of $1,538,323, for plaintiff United States in the amount of $100,000.00, with interest of an equal amount, for a total of $200,000.00.

6. Misapplication of $99,500,000.00 to satisfaction of debt not connected with AVS Unit II. This is a claim in the amount of $15,468,662, reduced by the amount of the voluntary payment by Basin Electric in the amount of $2,417,429, for a net claim of $13,051,233. This amount shall be trebled and a $5,000 civil penalty imposed as per statute. The Court finds in favor of Norbeck/United States in the amount of $39,158,699.

7. Dakota Coal Co. Tax Credits. This is a claim for $119,800.00. The Court finds in favor of defendant Basin Electric for a dismissal of this claim.

8. Imputing interest on equity capital. This is a claim for $4,253,917. The Court finds in favor of defendant Basin Electric for a dismissal of this claim.

The only area which the court finds evidences the requisite "reckless disregard of the truth" in the conduct of the employees of Basin Electric is that of the misapplication of the $99,500,000 of sale proceeds of AVS Unit II. The accounting and management staff knew that interest on the remaining debt of the AVS was being allocated in part as an expense item, in addition to the lease payments, in computing the "cost" to WAPA under the contract. The exhibits show that Basin Electric made a deliberate decision to retire other debt with these proceeds. (Ex. No. 347) The result was a continuing overcharge to WAPA for interest costs on the unpaid debt.

Mr. Norbeck obviously knew of the situation. He used references to it in his correspondence with Mr. McPhail. (Ex. No. 360) (This is what Mr. Nodland refers to as the "whistle blower letter." My personal reaction is that it would be better labeled as "give me my job back or I'll rat you out" letter, but motive on the part of Mr. Norbeck is not relevant.) When the letter to Mr. McPhail and the letter to Mr. Higgins recovered from Mr. Norbeck's office computer triggered the investigation by members of Mr. Easton's staff, the audit team deliberately selected an assumption that the $99,500,000 payment did not have to be applied to that portion of the remaining debt being charged to WAPA (AVS Unit II and 50% of the

common area) but to the reduction of debt applicable to AVS Unit I as well. The correspondence shows that WAPA personnel didn't have a clue about what was at issue.

I also sense that the Basin Electric personnel involved in these decisions firmly believed that all truth, wisdom and justice supported this position as the net effect of the purchase and lease back of AVS Unit II did in fact result in a reduction of cost to WAPA, and WAPA management was pleased with this further demonstration of good faith and fair dealing. Unfortunately, this small advantage to WAPA does not justify the deliberate overcharge in the interest account, which, when linked to the myriad of small edges taken by Basin Electric in the various areas making up the cost computations, is sufficient to satisfy the fraud requirement of the False Claims Act. In all other claims where plaintiffs have been found to be successful, the Court finds simple contract breaches to have occurred.

The Court expresses no opinion on the possible effect the settlement agreement entered into between the United States and Basin Electric, whereby the government dismissed the fraud claims, may have upon the Qui Tam portion of the Judgment. The settlement agreement has not been filed with the Court. The Court notes that the settlement agreement may have the effect of a partial satisfaction of the government's net share of the Qui Tam portion of the award.

PREJUDGMENT INTEREST

The government having prevailed on two of its contract claims and Mr. Norbeck having proven fraud on the misapplication of sale proceeds, the issue of prejudgment interest must be addressed. As a matter of North Dakota law prejudgment interest is mandatory for breach of contract. N.D.C.C. § 32-03-04. Therefore, the government is entitled to prejudgment interest on the two contract claims on which it prevailed.

The award of prejudgment interest under the False Claims Act is not mandated. The Second, Fifth and Ninth Circuits do not allow prejudgment interest to be awarded under the False Claims Act. *United States v. McLeod*, 721 F.2d 282, 285 (9th Cir. 1983); *Peterson v. Weinberger*, 508 F.2d 45, 55 (5th Cir.1975); *United States v. Foster Wheeler Corporation*, 447 F.2d 100, 102 (2nd Cir. 1971). The Eighth Circuit allows the award of prejudgment interest in False Claims Act cases but does not mandate it. *United States v. Cooperative Grain and Supply Co.*, 476 F.2d 47, 62 (8th Cir. 1973). This Court is of the opinion that prejudgment interest is not warranted in this case. The Act calls for the trebling of damages. The trebling effect will amount to nearly $40,000,000. This sum is sufficient to make the government whole and satisfy the intent of Congress. *McLeod*, 721 F.2d at 285. An award of prejudgment interest would result in overcompensation to the plaintiffs.

Counsel for plaintiffs are directed to prepare a judgment in accord with this Memorandum and Order, and to submit it to the court for review.

Dated this 26th day of March, 1999.

/s/ Patrick A. Conmy
Patrick A. Conmy, District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

UNITED STATES OF AMERICA, ex rel. ROBERT J. NORBECK,	)	
Plaintiffs,	)	Civil No. A1-95-003
vs.	)	(Filed June 30, 1999)
BASIN ELECTRIC POWER COOPERATIVE,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Pending before the Court are the Defendant's Motion to Amend Findings, Plaintiffs' Motions for Costs and Fees and Plaintiff Norbeck's Petition for Relator's Share.

I. Motion to Amend Findings

The Defendant has moved the Court to amend its findings in this case. The Defendant argues the Plaintiff's expert misunderstood the facts and the Court carried that misunderstanding into its decision, Plaintiffs failed to establish a False Claims Act violation and the record lacks sufficient evidence to support the Court's findings on the 10/20 issue. On the issue of damages the Defendant argues treble damages may not be awarded for bills submitted before October 27, 1986 and prejudgment interest is not mandatory.

The trial of this case consumed nine days. Numerous expert witnesses testified and hundreds of exhibits were

introduced. The issues were extremely complex. Counsel had ample time at trial to present evidence and argue their cases to the Court. The Court, as trier of fact, issues its decision on April 26, 1999. Without going into great detail, the Court is unpersuaded by the Defendant's post trial arguments on the facts of the case. The same issues presented in this motion to amend were argued at trial. The Court has not been persuaded it committed error. The Court will not alter its earlier findings of fact.

On the issue of damages the Defendant's arguments are more tenable. The Plaintiffs do not contest the Defendant's argument regarding the trebling of damages. The 1986 amendment of the False Claims Act called for the trebling of damages where, prior to the 1986 amendment, doubling was called for. *Miller v. Federal Emergency Management Agency*, 57 F.3d 687, 689 (8th Cir. 1995). The 1986 amendments should not be applied retroactively. *Id.* Thus, the billings submitted prior to October 27, 1986, the effective date of the amendment, are subject only to doubling. As such, the damages in qui tam portion of this case must be reduced by $3,199,744 to a new total of $35,958,955. The previous award having been $39,158,699.

In its previous order the Court awarded $4,430,070 in prejudgment interest on the 10/20 damage award. The Government suggests the prejudgment interest should be reduced to $2,872,371, which reflects a more appropriate interest rate. 28 U.S.C. § 1961. Where the United States is a party the question of prejudgment interest is a matter of federal common law rather than state law. *Royal Indemnity Co. v. U.S.*, 313 U.S. 289, 296-97 (1941). Prejudgment interest should be awarded when the amount of the

underlying liability is reasonably capable of ascertainment. *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 752 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986). Such an award is not mandatory but rather is left to the discretion of the court. *U.S. v. American Commercial Barge Line Co.*, 988 F.2d 860, 863-64 (8th Cir. 1993).

Basin's argument must fail because it is based on the difficulty of the liability issue rather than a difficulty in calculating damages. The Government is entitled to the time use of its money. Prejudgment interest is necessary to make the Government whole on this breach of contract claim. The amount of damages in this case was readily calculable.[1] The issue was whether a ten or twenty year amortization period should have been used. This 10/20 issue was complex. The damage calculation was not. The prejudgment interest amount previously ordered shall be reduced to $2,872,371, a $1,557,699 reduction.

II. Costs and Fees

A. Government's request for costs

The Government has submitted a motion for award of costs and a bill of costs. The request is for expenses related to five witnesses who testified at trial and two witnesses who attended depositions. Deposition, transcript and copying costs are also requested. The award of costs and fees is covered by statute at 28 U.S.C. §§ 1920 and 1921.

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[1] Basin acknowledges this point in their memorandum at page 42.

The fees for the clerk and marshall are granted. 28 U.S.C. § 1920(1). Fees for court reporting of depositions and hearing are discretionary. 28 U.S.C. § 1920(4). Costs associated with depositions necessarily obtained and not obtained for purely investigative purposes may be awarded at the discretion of the court. *Zotos v. Lindbergh School Dist.*, 121 F.3d 356, 363 (8th Cir. 1997). Given the extremely complex nature of this case the depositions taken were necessary for the Government to develop the evidence and prepare for trial. Costs associated with depositions and transcripts are granted.

The Government also requests copying costs. Statutory authority for awarding copying costs does exist. 28 U.S.C. § 1920(4) This case was document intensive. Hundreds of exhibits were introduced at trial. An award of $725 for copies necessarily obtained does not seem unreasonable.

Witness fees of $40 per day for each days attendance are standard. 28 U.S.C. § 1821(b). Travel and subsistence allowances are also appropriate. 28 U.S.C. § 1821(c). Absent special circumstances, travel expenses for witnesses located outside the district are limited to 100 miles. *See Linneman Constr. Inc. v. Montana-Dakota Util. Co.*, 504 F.2d 1365, 1371 (8th Cir. 1974). The special circumstances in this case were the complex nature of the case and the need for expert testimony on the numerous accounting issues presented. The requested travel expenses and subsistence allowances do not appear out of the ordinary. The requested travel expenses and witness fees are granted.

In summary, the Government's motion for costs is granted in the amount requested, $24,759.02.

B. Plaintiff Norbeck's request for attorneys' fees and costs

Plaintiff makes a motion for attorneys' fees. Reasonable attorneys' fees shall be awarded in False Claims Act Cases. 31 U.S.C. 3730(d). Plaintiff's attorney has submitted a statement of account showing 2377.25 hours expended on this case. This case took over four years to complete. Given the length and complexity of this case the number of hours expended by attorney Nodland do not seem unreasonable. Basin makes several objections to the statement of account including billing for non-attorney time and vagueness. Mr. Nodland responds at length to the objections and the Court will accept his explanations. In so far as Plaintiff may have failed to comply with local rule 54.1 a waiver is granted. Attorney's fees are granted at a $120 hourly rate for a total of $285,270.00. This is the same hourly rate used in the subsection (h) companion case.

Included in attorney Nodland's statement of account is a request for expenses in the amount of $18,452.71. Fees for computerized legal research are not separately taxable. *Standley v. Chilhowee R-IV Sch. Dist.* 5 F.3d 319, 325 (8th Cir. 1993). Charges for postage and toll calls are similarly unallowable. *Hollenbeck v. Falstaff Brewing Corp.*, 605 F.Supp. 421, 439 (E.D. Mo. 1984), *aff'd* 780 F.2d 20 (8th Cir. 1985). Costs for attorney travel and lodging may not be taxed as costs. *Id.* Parking expenses will not be taxed as costs. *See Walters v. President and Fellows of Harvard*

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College, 692 F.Supp. 1440, 1442 (D. Mass. 1988). The copying costs, deposition transcript costs, filing fees and process fees will be allowed in the amount of $13,007.55.

Also submitted to the Court is an affidavit and expense report from Mr. Norbeck requesting $108,389.70. Mr. Norbeck seeks fees for attorneys he consulted prior to hiring Mr. Nodland. The Court is aware of no legal basis upon which such an award may be made and this Court will not allow them. Consulting fees for Professor Heitger in the amount of $89,558.37 are also sought. As discussed above, witness fees are limited to $40 per day. The trial lasted nine days. Witness fees in the amount of $360 will be allowed for Professor Heitger. Various other expenses are also sought such as "meals with attorneys" and office supplies. These appear personal in nature to Mr. Norbeck and will not be allowed. Mr. Norbeck did not testify at trial. Mr. Norbeck states he only seeks to be made whole. The damage award in this case is certainly enough to make Mr. Norbeck whole.

III. Relator's Share

By law the relator in a False Claims Act case such as this is to receive not less than 25% nor more than 30% of the proceeds. 31 U.S.C. 3730(d)(2) The Relator in this case, Robert J. Norbeck, seeks a 30% share. The Government does not oppose this. The Relator's share does not apply to the contract issues which the Government prevailed upon. The Relator's share shall be established at 30%.

It is hereby **ORDERED** that the Defendant's Motion to Amend Finding (Docket No. 197) is **GRANTED** as

stated above; the Government's Motion for Costs (Docket No. 204) is **GRANTED** in the amount of $24,759.02; Plaintiff Norbeck's Motion for Attorney's Fees and Costs (Docket No. 202) is **GRANTED** in the following amounts $285,270.00 in attorney's fees, $13,007.55 in costs and $360 for witness fees.

It is **FURTHER ORDERED** that Plaintiff Norbeck's Petition for Relator's Share of Proceeds (Docket No. 201) is **GRANTED**, Relator's share of proceeds shall be 30%.

Let Judgment be entered accordingly.

Dated this 30th day of June, 1999.

/s/ Patrick A. Conmy
Patrick A. Conmy,
District Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3122/3216/3450

United States of America, ex rel Robert J. Norbeck, Appellee,	*	
v.	*	Order Denying Petition for Rehearing and for Rehearing En Banc
Basin Electric Power Cooprative, Appellant.	*	

The petition for rehearing by the panel, as well as the petition for rehearing en banc, is hereby denied.

The court denies leave to file a reply to the response to the petition for rehearing.

(5128-010199)

August 21, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

United States District Court

District of North Dakota – Southwestern Division

United States of America, ex rel Robert J. Norbeck	**JUDGMENT IN A CIVIL CASE**
v.	(Filed Sep. 25, 2001)
Basin Electric Power Cooperative	Case Number: A1-95-003

— **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that Norbeck's claims arising under the False Claims Act and the Government's claim involving the coal quantity are dismissed with prejudice.

September 25, 2001
Date

Edward J. Klecker
Clerk

Kathy Schirber
By Deputy Clerk –
Kathy Schirber

RULE OF CIVIL PROCEDURE

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trail court to judge of the credibility of the witnesses. The findings of a master, to the extend that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) **Amendment.** On a party's motion filed no later than 10 days after entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings

may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

(c) **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995).